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CONTENTS.

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The Supreme Court of the United States has, in the recent case of Ticklin v. Taxing District, undertaken to define the limits between the taxation by a State or municipality of trades, professions and occupations, within such State, and the taxation of what is known as interstate commerce. The parties complaining of the tax in the above case were merchandise brokers of Shelby County, Tennessee, where they rented a room, and exhibited their samples. They used no capital in their business, and were neither buyers nor sellers, and simply negotiated sales for their respective principals. They claimed to do precisely the same business that commercial drummers do; the only difference being that they are stationary, while drummers are transitory. It was claimed also that all of the sales negotiated were exclusively for non-resident firms who resided and carried on business in other States than Tennessee. The act in question imposed a tax upon "every person or firm dealing in cotton or any other article whatever, whether as factor, broker, buyer or seller on commission or otherwise." It was contended that the act was unconstitutional, as imposing a tax upon interstate commerce, and the case of Robbins v. Taxing District, known as the "Drummers' Tax Case," was strongly relied upon. The court, however, in distinguishing that case, drew a clear distinction between the taxation by a State of citizens of other States, selling or seeking to sell their goods in the former State, and the imposition of taxes upon persons residing within the State, and upon avocations and employments pursued therein, not directly connected with interstate commerce. In the case of Robbins the tax was held, in effect, not to be a tax on Robbins, but on his principals, while here the tax was clearly levied upon complainants in respect of the general commission business they conducted, and their property engaged therein, or their profits realized therefrom.

The court thought no doubt could be entertained of the right of a State legislature to tax trades, professions and occupations, in the absence of inhibition in the State constitution in that regard, and where a resident citizen engages in general business subject to a particular tax, the fact that the business done chances to consist, for the time being, wholly or partially in negotiating sales between resident and non-resident merchants of goods situated in another State does not necessarily involve the taxation of interstate commerce, forbidden by the constitution.

The cases of Lyng v. State, 135 U. S. 161; McCall v. California, 136 U. S. 104; Philadelphia, etc. S. S. Co. v. Penn., 122 U. S. 326; Wiggins Ferry Co. v. City of East St. Louis, 107 U. S. 365; Maine v. Ry. Co., 142 U. S. 216, are reviewed by the court and shown to support its conclusion.

Mr. Justice Harlan, however, as per his vigorous dissenting opinion, does not think that the opinion of the court is "in harmony with numerous of its decisions." The fact that he makes a plausible argument in behalf of his view, using and applying the same cases cited by the court, is a striking illustration of the proverbial fallibility of the human mind. Justice Harlan thinks that the result of the present decision is that while, under Robbins v. Taxing District, a license tax may not be imposed in Tennessee upon drummers for soliciting there the sale of goods to be brought from other States; while, under Leloup v. Port of Mobile, a local license tax cannot be imposed in respect to telegrams between points in different States; and while, under Stoutenburgh v. Hennick, commercial agents cannot be taxed in the District of Columbia for soliciting there the sale of goods to be brought into the District from other States—the taxing district of Shelby County may require, as a condition of granting a license as merchandise broker, that the applicant shall pay a license fee, and, in addition, two and one-half per cent. upon the gross commissions received, not only in the business transacted by him that is wholly domestic, but in that which is wholly interstate.

NOTES OF RECENT DECISIONS.

CONTRACTS—AFFECTING ACTION OF PUBLIC BODIES — PUBLIC POLICY. — The Supreme Court of Pennsylvania, in Spalding v. Ewing,

24 Atl. Rep. 219, decide that a contract to pay for professional services in securing additional compensation for defendant as postmaster, where such services consisted in securing special legislation to compel the post-office department to pay a claim which had been rejected, is contrary to public policy, and cannot be enforced. Sterrett, J., says:

It thus appears by the depositions above referred to that defendant's claim and many similar claims against the post-office department had been considered and rejected. As testified by plaintiff, "the postmaster general for years resisted defendant's claim." The burden of plaintiff's undertaking appears to have been the procurement of what he terms a "legislative mandate," the avowed object of which was to compel recognition of the claims rejected, and so long resisted, by the post-office department. It is very evident from the uncontradicted testimony of plaintiff and his son that strictly professional services, such as preparing petition to congress, drafting the necessary bill, furnishing such statement and proofs of said claims as were necessary to proper understanding of their merits. etc., must have constituted a very significant part of the "seven years' labor" "the most laborious and protracted services," the numerous "applications to committees," "from session to session of congress," etc., testified to by him. According to his own account of it, the work of engineering the bill through congress, despite the strong and determined opposition of the post-office department, must have been multiform, persistent, and so conspicuously effective that plaintiff was honored with the paternity of the "legislative mandate" by calling it the "Spalding Act." The plaintiff's evidence is not susceptible of any other inference than that, in the main, the services contemplated by the contract in suit, and actually rendered in pursuance thereof, were such as have been repeatedly pronounced contrary to public policy. In Clippinger v. Hepbaugh, 5 Watts & S. 315, the condition of the obligation to pay $100 was that the obligee should succeed in procuring from the legislature the passage of a law authorizing the obligor and his wife to sell and convey certain real estate devised to the latter and her children. In refusing to sustain the contract, this court said: "It is not necessary to say that a certain compensation for such services may not be recovered; but we are clearly of opinion that it would be against sound policy to sanction a practice which may lead to deceit, improper and corrupt tampering with legislative action. It is not required that it tends to corruption, If its effect is to mislead, it is decisive against the claim; and that such is its tendency no human being can reasonably doubt. · · · The law will not aid in enforcing any contract that is illegal, or the consideration of which is inconsistent with public policy and sound morality, or the integrity of the domestic, civil, and political institution of the State. · · · It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract, that it is contrary to sound morality and public policy, leading, necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal." The same general principle is recognized in the following cases: Hatzfield v. Gulden, 7 Watts, 152; Bowman v. Coffroth, 59 Pa. St. 19; Ormerod v. Dearman, 100 Pa. St. 561. In the last case the present chief justice, referring to the authorities, said they "established the principle that contracts which have for their subject-matter any interference with the creation of laws, or their due enforcements, are against public policy and therefore void." In Burke v. Child, 21 Wall. 441, the validity of a contract to procure the enactment of a law authorizing the payment of a private claim was fully considered by the Supreme Court of the United States. After referring to Clippinger v. Hepbaugh, *supra*, and three other American cases, viz., Harris v. Roof's Ex'rs, 10 Barb. 489; Rose v. Truax, 21 Barb. 351; Marshall v. Railroad Co., 16 How. 314— in all of which such contracts were held to be against public policy, the court said: "We entertain no doubt that in such cases, as under all other circumstances, an agreement, express or implied, for purely professional services is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptional. But such services are separated by a broad line of demarkation from personal solicitation, and other means and appliances, such as the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business." After showing that the prohibition against contracts to procure either general or private legislation rests upon a solid foundation, the court further says: "To legalize the traffic of such services would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence, and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility, and a strong incentive, to use them. The widespread suspicion that prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased. It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those that are forbidden, the whole is a unit and undivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its

parts, the entire body of the contract." The principle under consideration is not restricted to contracts involving the procurement of legislation for a contingent compensation. It has been frequently recognized and applied in other transactions involving questions of public policy. Some of the instructive cases in which that has been done are the following: Tool Co. v. Norris, 2 Wall. 48, 56; Oscanyan v. Arms Co., 103 U. S. 261; Woodstock Iron Co. v. Richmond & D. Extension Co., 129 U. S. 643, 9 Sup. Ct. Rep. 402. In the first of these, an agreement, for compensation, to procure a contract from the government to furnish its supplies, was held to be against public policy, and could not be enforced. Mr. Justice Field, delivering the opinion of the court in that case, said: "The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation, These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. · · · Agreements for compensation, contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.

SPECIFIC PERFORMANCE—PAROL CONTRACT —CONVEYANCE TO WIFE. — The Court of Chancery of New Jersey, in Barbour v. Barbour, hold that in case a husband, against whom his wife has filed a petition for divorce upon the ground of adultery, asking for alimony and counsel fee, enters into an agreement with his wife, in and by which he promises that if she will dismiss her suit and return to him, and live with him as his wife, he will execute and deliver to her a deed for the house and lot in and upon which they had been living, and she accepts his offer, dismisses her suit, and returns to his home in good faith, he will be required to specifically perform such contract, even though it be by parol. The statute of frauds was not designed to protect the wrong-doer in case the remedy at law is wholly inadequate, and there has been a partial performance of the contract. After husband and wife have been separated, and they enter into contracts, which are reasonable, to become reconciled and to continue their conjugal relations, it is not against public policy to enforce such contracts. Bird, V. C., says:

The agreement is an agreement respecting the conveyance of land. The consideration was a valuable one. No consideration can be named of higher importance or of more solemn significance. It is difficult to measure it. Dollars and cents afford no adequate conception of the true nature of the consideration moving upon the one side to the execution of this agreement. This agreement is thus brought within every case that recognizes the doctrine of part performance in the slightest degree. Upon the part of the wife, it is not only partially but entirely performed. She not only agreed to become reconciled to him, but in the sincerest manner, by her conduct, manifested her determination so to continue. Looking at it from a pecuniary standpoint, she gave up all moneys that she would undoubtedly have been entitled to upon her application for alimony and counsel fees, had she pressed her petition against him because of his crime; and, more than this, she actually paid the costs and expenses incident to the suit which she had carried on to the time of making the agreement. She also dismissed her suit. The sums which she thus paid, and which she undoubtedly would have recovered (since he confesses the adultery), would soon have been very considerable. But, besides these things, he gave her and she took possession of the premises which by the agreement he was to convey as their relation to each other would admit of. Upon his promise to convey if she would become reconciled and live with him, she consented, and went with him and took possession, where they both continued to reside. I think there can be no possible doubt but that these facts show the part performance contemplated by the very highest judicial tribunals which have considered this branch of equity jurisprudence. If it be said that the payment of money and the taking of possession under the contract be not enough to take the case out of the statute, yet where these things have been done, and it appears that fraud has been perpetrated by the defendant, and that the remedy at law is inadequate to complete relief, then it is the duty of a court of chancery to administer relief in such case, notwithstanding the provisions of the statute, and thereby prevent the wrong which the statute was designed to prevent. The following cases are in point: Phillips v. Thompson, 1 Johns. Ch. 131, 149; Wakeman v. Dodd, 27 N. J. Eq. 564; Shepard v. Shepard, 7 Johns. Ch. 57.

In the second place, it is not contrary to public policy, as understood in this State, notwithstanding it may be so regarded in others, to maintain the integrity of such contracts. In Merrill v. Peaslee, 16 N. E. Rep. 271, it was held by a divided court (in Massachusetts) that such contracts ought not to be enforced. To the same effect is the case of Copeland v. Boaz, 9 Baxt. 223. But I take it for granted, from what has been said by the courts of this State respecting agreements between husband and wife, looking to their separation, that agreements providing for the peaceable continuance of their marital relations would be most certainly sustained. In the case of Emery v. Neighbor, 7 N. J. Law, 142, the court held that covenants which purported to be tripartite (the husband being one party, the wife another, and a proposed trustee a third), in the execution of which the third party did not join, were inoperative and void, but said: "Where a husband, by articles, places money in the hands of trustees for the sole and separate use of the wife, and to be subject to her sole order and disposition, although the articles of agreement may be wholly inoperative as an article of agreement, in consequence of the trustees never signing the same, yet if the wife, upon the faith of this agreement, lived separate and apart from her husband, and at her death makes a testamentary disposition of this money, her administrator may recover it from the said trustee, and her husband will not be entitled to it." In Calame v. Calame, 25 N. J. Eq. 548, after a careful review of the authorities, the court of errors and appeals decided: "An agreement in writing, made by a

husband who had deserted his wife, to give her certain lands and money in lieu of all her claim upon him for maintenance, the offer having been accepted by the wife, will, on a divorce being granted, be enforced in equity." In Adams v. Adams, 91 N. Y. 381, it was held: "Plaintiff, having commenced an action against defendant, her husband, for divorce *a vinculo*, and having examined a witness conditionally, who testified to the acts of adultery charged, in consideration of his executing to her father, for her benefit, a note for $1,000, agreed to and did discontinue the action, without costs. In an action upon the note it was held that it was given for a good consideration and was valid; that the transaction could not be regarded as against public policy." The court further observes: "We are unable to perceive on what ground the arrangement can be regarded as against public policy. It tends to restore peace and harmony between husband and wife, and renew their conjugal relations. Agreements to separate have been regarded as against public policy, but it would be strangely inconsistent if the same policy should condemn agreements to restore marital relations after a temporary separation had taken place. While the law favors the settlement of controversies between all other persons, it would be a curious policy which should forbid husband and wife to compromise their differences, or preclude either from forgiving a wrong committed by the other." To the same effect are Phillips v. Meyers, 82 Ill. 67; Reamey v. Bayley (Pa.), 11 Atl. Rep. 438; Hart v. Hart, 18 L. R. Ch. Div. 670.

CONSTITUTIONAL LAW — ILLEGAL SALE OF OLEOMARGARINE — INTERSTATE COMMERCE.— An interesting question of constitutional law is involved in the decision of Commonwealth v. Huntley, 30 N. E. Rep. 1127, by the Supreme Judicial Court of Massachusetts, where it is held that Stat. 1891, ch. 58, wholly prohibiting the manufacture or sale, or the offering or exposing for sale, of any article "which shall be in imitation of yellow butter produced from pure, unadulterated milk or cream," but providing that nothing in the act shall be construed to prohibit the manufacture or sale of oleomargarine in a distinct form, and in such manner as will advise the consumer of its real character, free from coloration or ingredient that causes it to look like butter, does not prohibit commerce in oleomargarine, but prohibits deception in the sale of it for butter, and, though it prevents such sale in original packages of oleomargarine brought from another State, is a valid police regulation, and not an unconstitutional interference with interstate commerce. Knowlton and Lathrop, JJ., dissent in a vigorous opinion. Allen, J., says:

It is not contended that St. 1891, ch. 58, is in violation of the constitution of Massachusetts, but it is urged that it is in violation of the constitution of the United States. It was agreed that the petitioner sold an article the sale of which was forbidden by this statute; that oleomargarine has naturally a light yellowish color; and that the article sold by the petitioner was artificially colored in imitation of yellow butter. We are to assume that the oleomargarine sold by the petitioner was wholesome, palatable, and nutritious. In respect to intoxicating liquors, it was held in Peirce v. New Hampshire, 5 How. 504, that a law of New Hampshire, the effect of which was to prohibit the sale, without license, of a barrel of gin, purchased by the defendant in Massachusetts, and by him imported into New Hampshire, was not repugnant to the constitution or laws of the United States. In this commonwealth, until the recent case of Leisy v. Hardin, 135 U. S. 100, 10 Sup. Ct. Rep. 681, this decision has been considered as still in force (Carleton v. Rugg, 149 Mass. 150, 22 N. E. Rep. 55; Blair v. Forehand, 100 Mass. 136, 140; Com. v. Holbrook, 10 Allen, 200); and only liquors imported from foreign countries have been considered to be outside of the scope of State legislation, congress having acted only in respect to such (St. 1852, ch. 322, § 14; St. 1869, ch. 415, § 27; Pub. St. ch. 100, § 4; Com. v. Kimball, 24 Pick. 359; Fisher v. McGirr, 1 Gray, 1, 31, 47; Richards v. Woodward, 113 Mass. 285.) Peirce v. New Hampshire is, however, overruled by Leisy v. Hardin, the majority of the court holding that its authority, in so far as it rests on the view that the law of New Hampshire was valid because congress had made no regulation on the subject, must be regarded as having been distinctly overthrown by numerous cases. 135 U. S. 118, 10 Sup. Ct. Rep. 681. A minority of the court, consisting of Justices Gray, Harlan, and Brewer, came to another conclusion, and, after an elaborate examination of the various cases, say that this review appears to them to demonstrate that that decision, while often referred to, has never been overruled, or its authority impugned. 135 U. S. 158, 10 Sup. Ct. Rep. 681. The later decision of O'Neil v. Vermont, 12 Sup. Ct. Rep. 693 (not yet officially reported), does not modify the doctrine declared in Leisy v. Hardin. Accepting without discussion the decision of the majority of the court in Leisy v. Hardin as settling the law for whatever it covers, we have to consider whether it extends so far as to cut off the power of the legislature to forbid the manufacture and sale of oleomargarine which is made in imitation of yellow butter, when such oleomargarine has been imported from another State. We wish and are bound to conform to that decision, and to adopt the change which it has made in the law as heretofore understood in this commonwealth, to the extent that the decision goes, either in express terms or by necessary implication. If, however, any further step is to be taken in that direction, it is better that it should be done by the tribunal which can declare and settle the law for all the States alike, than for us to make a decision not sanctioned by our own convictions, and perhaps not required by the views of constitutional rights and obligations entertained by the tribunal of last resort.

In cases where the constitutional provision that congress shall have power to regulate commerce with foreign nations and among the several States has not been involved or considered, legislation of the character of St. 1891, ch. 58, is supported not only by the custom of this commonwealth, and by previous decisions of this court, but by a great weight of authority elsewhere. The statutes and decisions in relation to the sale of milk to which water has been added, and of milk below a certain standard of quality, furnish the most obvious examples arising in this commonwealth, as showing that the legislature has rested

and been vindicated partly on the ground of promoting the health of the community, but more especially on the ground of protecting the public from fraud. Pub. St. ch. 57, § 5; St. 1886, ch. 318, § 2; Com. v. Waite, 11 Allen, 264; Com. v. Farren, 9 Allen, 489; Com. v. Evans, 132 Mass. 11; Com. v. Holt, 146 Mass. 38, 14 N. E. Rep. 930; Com. v. Schaffner, 146 Mass. 512, 16 N. E. Rep. 280; Com. v. Wytherbee, 153 Mass. 159, 26 N. E. Rep. 414; State v. Campbell, 64 N. H. 402, 13 Atl. Rep. 585; State v. Smyth, 14 R. I. 100; People v. West, 106 N. Y. 293, 12 N. E. Rep. 610. See, also, the statutes relating to vinegar (St. 1884, ch. 307); to adulterated drugs and food (St. 1882 ch. 263, § 1): and wholly prohibiting the sale of jewelry, feathers, and certain other articles by peddlers (Pub. St. ch. 68, § 3.) In New Hampshire, Missouri, Minnesota, New York, New Jersey, and Pennsylvania statutes prohibiting the sale of oleomargarine made in imitation of butter have been upheld by the courts as valid. State v. Marshall, 64 N. H. 549, 15 Atl. Rep. 210; State v. Addington, 77 Mo. 110; Butler v. Chambers, 36 Minn. 69, 30 N. W. Rep. 308; People v. Arensberg, 105 N. Y. 125, 11 N. E. Rep. 277; Waterbury v. Newton, 50 N. J. Law, 534, 14 Atl. Rep. 604; Powell v. Com., 114 Pa. St. 265, 7 Atl. Rep. 913. In People v. Arensberg the decision rested expressly upon the distinction between oleomargarine made in imitation or resemblance of butter and other oleomargarine which was not intended to be passed off for butter. In Powell v. Com., the court, by Mr. Justice Sterrett, say: "If an article of food is of such a character that few people will eat it, knowing its real character; if at the same time it is of such a nature that it can be imposed upon the public as an article of food which is in common use, and against which there is no prejudice; and if, in addition to this, there is probable ground for believing that the only way to prevent the public from being defrauded into purchasing the counterfeit article for the genuine is to prohibit altogether the manufacture and sale of the former—then we think such a prohibition may stand as a reasonable police regulation, although the article prohibited is in fact innocuous, and although its production might be found beneficial to the public, if in buying it they could distinguish it from the production of which it is the imitation." 114 Pa. St. 295, 296, 7 Atl. Rep. 915, 916. This case was carried by writ of error to the Supreme Court of the United States, and the judgment of the State court was affirmed. Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257. See, also, Patterson v. Kentucky, 97 U. S. 501; Mugler v. Kansas, 123 U. S. 623, 663, 8 Sup. Ct. Rep. 273.

The only question, therefore, respecting which there there is occasion to doubt, is that arising under the provision giving to congress power to regulate commerce among the several States. It is always conceded that States may pass laws to prevent the introduction within their limits of certain kinds of articles. No full and final enumeration has been made or attempted of the articles which thus remain subject to the exercise of the police power. In Rahrer's Case, 140 U. S. 545, 11 Sup. Ct. Rep. 865, the court quote with approval the language of Mr. Justice Catron in the License Cases, 5 How. 599: "If from its nature it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the State that it no longer belongs to commerce, . . . then the State power may exclude its introduction." And again: "That which does not belong to commerce is within the jurisdiction of the police power of the State." 140 U. S. 557, 11 Sup. Ct. Rep. 867. In Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, the court say: "Doubtless the States have power to provide by law suitable measures to prevent the introduction into the States of articles of trade, which, on account of their existing condition, would bring in and spread disease, pestilence, and death, such as rags or other substances infected with the germs of yellow fever or the virus of small-pox, or cattle or meat or other provisions that are diseased or decayed, or otherwise from their condition and quality unfit for human use and consumption. Such articles are not merchantable; they are not legitimate subjects of trade and commerce." Page 489, 125 U. S., and page 700, 8 Sup. Ct. Rep. The right to exclude convicts, paupers, idiots, and lunatics and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases, was also fully recognized. Page 492, 125 U. S., and page 702, 8 Sup. Ct. Rep., and cases cited. These doctrines are also stated in Leisy v. Hardin, where it is declared that "the power to regulate commerce among the States is a unit, but, if particular subjects within its operation do not require the application of a general or uniform system, the States may legislate in regard to them, with a view to local needs and circumstances, till congress otherwise directs." 135 U. S. 108, 10 Sup. Ct. Rep. 684. And again; "Where the subject-matter requires a uniform system as between the States, the power controlling it is vested exclusively in congress, and cannot be encroached upon by the States; but where, in relation to the subject-matter, different rules may be suitable for different localities, the States may exercise powers which, though they may be said to partake of the nature of the power granted to the general government, are strictly not such, but simply local powers, which have full operation until or unless circumscribed by the action of congress in effectuation of the general power." 135 U. S. 109, 10 Sup. Ct. Rep. 684; citing Cooley v. Port Wardens of Philadelphia, 12 How. 299.

The difficulty of drawing a clear line of distinction between articles which from their nature the legislature of a State may exclude as injurious to health or morals, and those which must be deemed to be proper objects of commerce, is obvious. Nor is it more easy to define with exactness what subjects should be considered so far local that statutes in respect to them may properly be passed by a State though incidentally affecting commerce among the several States, until congress provides otherwise. But all we have to deal with at present is the particular question now before us. The legislature, while allowing the sale of oleomargarine in such form as will indicate its real character to the consumer, has determined that its manufacture and sale, when it is made in imitation of yellow butter, is so productive of deception and fraud as to call for a prohibition of such manufacture and sale. This mischief has been found to exist here. It may or it may not exist in equal force elsewhere. The action of the legislature must be presumed to have been taken upon full investigation, and upon reasonable grounds. This presumption in favor of substantially similar legislation of another State is thus expressed by the Supreme Court of the United States: "The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk, or cream from unadulterated milk, to take the place of butter produced

from unadulterated milk, will promote the public health, and prevent frauds in the sale of such articles." Powell v. Pennsylvania, 127 U. S. 676, 678, 8 Sup. Ct. Rep. 992, 1257. See, also, Patterson v. Kentucky, 97 U. S. 501, 504. By the statute oleomargarine which is not deceptive in its character may be sold under certain regulations. Oleomargarine which is deceptive, and which is designed and is likely to be passed off for something different from what it really is, must not be made or sold within the State. This prohibition is applicable to residents and non-residents alike. The question is, may a State protect itself against articles so prepared as to deceive the public? No such question as this arose or was discussed in Leisy v. Hardin. Accepting the decision in that case as settling the law for intoxicating liquors of genuine quality, which are what they purport to be, and for tobacco and other articles which are included in the same category of genuine products or compounds, there is a wide distinction between them and articles which are manufactured with a purpose to pass them off for something different from what they purport to be. If the statute under consideration had assumed to forbid the sale of all oleomargarine, a far different question would be presented. But the statute is only directed to the suppression of the manufacture and sale in this commonwealth of oleomargarine which is deceptive. If the sale of imported liquors which are genuine is protected, does that protection extend so far as to include bogus and imitation liquors, so prepared as to be passed off for genuine? If the public were largely imposed upon by the sale of cigars which appeared to consist solely of tobacco, but which in reality were principally composed of something else, would a statute forbidding the manufacture and sale of such deceptive cigars be deemed to interfere with the power of congress under the constitution? The statute does not forbid the mere transportation even of deceptive oleomargarine. It may be carried through this State, or may be brought here for purposes of temporary storage or for the consumption of the importer. What is forbidden is the manufacture or sale. The effect of the statute upon commerce among the States is only indirect and incidental. Sherlock v. Alling, 93 U. S. 99; Waterbury v. Newton, 50 N. J. Law, 534, 14 Atl. Rep. 604. Can it be doubted that the legislature may provide for the seizure and destruction of lottery tickets, although in some parts of the country, as they were formerly in Massachusetts, lotteries are still sanctioned by law? Might not the State exclude a patented invention for drawing lotteries? See Vannini v. Paine, 1 Har. (Del.) 65, cited in 97 U. S. 508. There being a palpaple distinction between the present case and Leisy v. Hardin, this court is at liberty to decide upon the validity of the statute involved in the present case according to its own opinion.

In the opinion of a majority of the court, the enactment of the statute is a valid exercise of the police power which remains in the several States; and it is not in violation of the constitutional provisions giving to congress the power to regulate commerce among the several States. The latter doctrine has also been expressly held in New Jersey. Waterbury v. Newton, 50 N. J. Law, 534, 14 Atl. Rep. 604. The case of Minnesota v. Barber, 136 U. S. 313, 10 Sup. Ct. Rep. 862, holds a statute to be invalid which by its necessary application practically excluded from the markets of the State all fresh beef, veal, mutton, lamb or pork, in whatever form, and although entirely sound, healthy and fit for food, taken from animals slaughtered in other States. Such a discrimination is held to be beyond the power of a legislature of a State. This decision, in which all the justices concurred, rests upon different grounds from Leisy v. Hardin, which is not referred to in the judgment of the court, delivered by Mr. Justice Harlan, one of the dissenting justices in that case. Brimmer v. Rebman, 138 U. S. 78, 11 Sup. Ct. Rep. 213, follows Minnesota v. Barber. In like manner, statutes forbidding the transportation of all Texas cattle, whether diseased or not, have been held unconstitutional, on the ground that they made no distinction. Railroad Co. v. Husen, 95 U. S. 465; Kimmish v. Ball, 129 U. S. 217, 221, 9 Sup. Ct. Rep. 277. Stat. 1891, ch. 58, does not fall within the principle of these decisions, it being limited in its operation to oleomargarine which is in imitation of yellow butter, and therefore of a deceptive character.

SHOULD APPELLATE COURTS REVIEW THE FACTS IN ACTIONS AT LAW?

In the May-June (1892) number of the *American Law Review*, Judge Riddick has written an interesting article with the above title. He correctly says that "in every lawsuit it is necessary to determine the facts before applying the law. It is equally important and frequently much more difficult, to correctly determine the facts than it is to correctly determine the law. How, then, should the facts be determined in actions at law? Should they be finally determined by the *nisi prius* court, allowing the appellate court to review errors of law only, or should they be reviewed by the appellate court?" And he reaches the conclusion that appellate courts should decide the law and not review the facts.

The question is one of considerable importance, both to the bar and the people of the several States. It will be conceded that the practice of reviewing the facts by appellate courts is an innovation on the common-law mode of trial by a jury, and that under the constitution of the United States "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." To what extent this provision restricts congress from providing that the supreme court may review the facts in a case, or the effect of such practice if established by the court itself, it is unnecessary to inquire, as the prohibition in no event can apply to the State courts. In a number of the States these changes were effected by statute. Ohio seems to have been one of the pioneers in this

legislation. By the act of March 12th, 1845, "to regulate the judicial courts and the practice thereof," appeals to the supreme court in actions at law were abolished, and it was provided that either party should have a right to except to the opinion of the court "in all cases of a motion for a new trial by reason that the verdict may be supposed to be against law or evidence, so that such case may be removed by writ of error." Three years later the same writ was secured in suits in equity by permitting errors in law and in fact to be assigned together in bills of review.[1] The code of procedure of that State, which took effect July 1st, 1853, abolished the distinction between actions at law and suits in equity, but was held not to contain the power to review the judgments of inferior courts upon the facts.[2]

In April, 1858, the third section of the act of 1845 was re-enacted, and it was expressly extended to a finding of facts by the court where a jury is waived, the right in that regard being the same as where the facts were determined by the verdict of a jury. The law is now well settled in that State that error will lie upon the ground that the verdict of the jury or the finding of the court is not sustained by or is against the weight of evidence.[3] I have thus particularly called attention to the statutes of Ohio because of the changes by reason of which the decisions are in conflict.

Under the Kansas code the supreme court does not possess the power to set aside a verdict because it is against the weight of evidence. In U. P. Ry. Co. v. Diehl,[4] it is said: "We think the verdict of the jury in the present case should have been set aside, and a new trial granted. It is the duty of a trial court, whenever the verdict is clearly against the weight or preponderance of the evidence, to set it aside and grant a new trial.[5] The supreme court, however, has no such power. Where the evidence is all in parol, and where there is some evidence sustaining every fact necessarily included in the verdict—not a bare scintilla, but enough evidence, if not contradicted, to prove every such fact—and where the trial court approves the verdict by refusing to set it aside, and by rendering a judgment thereon, the supreme court cannot disturb it, although a preponderance of the evidence may seem to be against the verdict.[6] It is perhaps unfortunate in many cases that the supreme court has no greater power in reviewing and setting aside verdicts; for, because of such inability on the part of the supreme court, injustice is sometimes permitted to be done."

The rule is not uniform in the other code States, but in many of them the power is expressly conferred upon the appellate court to weigh the evidence and sustain or set aside the verdict as the justice of the case may seem to require. It must be borne in mind that it requires a much stronger case in the appellate court to justify the granting, of a new trial because the verdict is against the weight of testimony than would be necessary in the trial court. Therefore, where the evidence is conflicting, and the trial court has overruled a motion for a new trial upon the ground that the evidence is insufficient to sustain the verdict, or that the verdict is against the weight of evidence, the appellate court will rarely disturb the verdict. The reason is, the jury having passed upon the credibility of the several witnesses and the weight to be given to the testimony of each, and their verdict having been brought before the trial court on a motion to set the same aside because not sustained by sufficient evidence, which motion has been overruled, thus adding the judgment of the judge before whom the cause was tried to that of the jury in favor of the verdict.

The rule, as I conceive it to be, is tersely stated by Judge Thurman, in French v. Millard,[7] as follows: "We are not satisfied that the verdict of the jury was right. But this is not enough. A mere difference of opinion between the court and the jury does not warrant the former in setting aside the finding of the latter. That would be, in effect, to abolish the institution of juries, and substitute the court to try all questions of fact. It

[1] Curwen's Stat. 1136-1139.

[2] House v. Elliott, 6 Ohio St. 497; Gest v. Kenner, 7 Ohio St. 75; Irwin v. Shaffer, 9 Ohio St. 43; Little Miami R. Co. v. Allen, 12 Ohio St. 428.

[3] Ide v. Churchill, 14 Ohio St. 372.

[4] 33 Kan. 425-6.

[5] Williams v. Townsend, 15 Kan. 564, 570, 571; K. P. Ry. Co. v. Kunkel, 17 Kan. 172; Brown v. A., T. & S. F. Ry. Co., 31 Kan. 2.

[6] See the above cases, and K. P. Ry. Co. v. Richardson, 25 Kan. 391, which is especially applicable to this case; also Seip v. Patrie, 19 Kan. 13; Beal v. Codding 32 Kan. 107.

[7] 2 Ohio St. 53-54.

must be clear that the jury has erred, before a new trial will be granted on the ground that the verdict is against the weight of evidence." This language was quoted and approved in McGatrick v. Wason.[8]

It is sometimes urged with considerable force that as the witnesses testify in the presence of the trial court and jury, who thus may observe the conduct of such witnesses in giving their testimony, their general appearance and apparent truthfulness, and are thereby enabled to give due weight to the testimony of each, and that the appellate court is deprived of this benefit, and therefore cannot determine the weight to be given the testimony. The argument is plausible, and where the testimony is not taken *verbatim* may have some force. In many of the States at the present time, however, short-hand reporters take down every word of testimony given and offered in a case, and this is preserved in a bill of exceptions and submitted to the appellate court as a part of the record. The appellate court thus has the entire record of the trial spread before it. If a witness has prevaricated or made inconsistent statements that show his testimony to be unworthy of belief, a court whose members have spent years in sifting and weighing testimony certainly may be trusted to consider the force and effect of that.

Testimony is to be judged by its apparent truthfulness and consistency, and these qualities are presented equally as well by the record as the oral examination. It is probable also that too much importance is attached to the appearance of the several witnesses and their conduct on the stand. An inadvertent remark, a hesitating manner in testifying or the opposite great boldness, may be seized upon as ground for discarding the testimony, while such testimony may be absolutely true. Every lawyer of experience knows that a timid, sensitive, conscientious witness unused to courts and juries is liable to give his testimony in a manner not calculated to impress a stranger with its truthfulness; yet almost invariably it is not only true but has not been stated as strongly as the facts will justify. So a bold front does not necessarily imply a reliable witness or the opposite. It may safely be said that as a rule verdicts founded upon the appearance of witnesses or their manner of testifying are liable to be wrong.

That there are many verdicts rendered against the clear weight of evidence is well known. These may be and frequently are the result of the inexperience of the jurors, their inabilty to seize upon the salient points in the testimony, and to discriminate between that which is of trivial importance and that upon which the right of the parties depend. They may also be produced by other causes, such as the general unpopularity of one of the parties. It is well known that there are persons in almost every county who find it difficult to obtain justice from juries. Now, shall these wrongs go unredressed, or shall the appellate courts be clothed with power where the verdict is clearly wrong to set it aside and grant a new trial? The great object of the law is to administer justice. To do this it is necessary that the courts be clothed with power to protect and enforce the rights of all the parties to an action. In equity cases, from the earliest period, appeals have brought up the entire case, and the facts, as well as the law have been reviewed. It would seem that the reasons for reviewing the facts in an action at law are much stronger than an in action in equity, yet reversals of decrees in equity upon the facts take place every week in the year.

In felony cases, under the common law, there being no mode of reviewing the facts or the law, the verdict of the jury is final, even though there may be a failure of proof upon a material point.

In a late number of the *Green Bag* there was an interesting account by the English correspondent of the trial of Miss Smith for poisoning her lover, and the attorney for the defense is complimented on his skill in conducting the same. He, no doubt, deserved the praise bestowed upon him, yet if the evidence was stated correctly, there was a link wanting in the chain of evidence, viz: the opportunity to administer the poison, as the proof as stated failed to show that they were seen together or had communication after his return, yet had the jury found her guilty, there is but little doubt the penalty would have followed. It may be said that there was no doubt of her guilt, and that it is the duty of courts to punish crime. It is their

[8] 4 Ohio St. 576.

duty also to see that the rights of those not proved guilty are protected.

There is much to commend in the common law, but no one will contend that its methods were best calculated to administer justice or that they should be adhered to when they result in manifest injustice. In Fisk v. State[9] it is said: "The jury may misconceive the issue, misunderstand the instructions, fail to analyze all the facts, or in times of excitement be unconsciously influenced by popular clamor, and unless the court will correct the wrongs, although they may involve loss of life, liberty or property, they must go unredressed."

SAMUEL MAXWELL.

[9] 9 Neb. 66.

OPTION CONTRACTS—WAGER—RECOVERY OF AMOUNTS LOST.

LESTER V. BUEL.

Supreme Court of Ohio, March 22, 1892.

1. A contract whereby one of the parties is to have the option to buy or sell at a future time a certain commodity, on the understanding of both that there is to be no delivery of the commodity, the party losing to pay to the other the difference in the market price simply, is by common law as well as by statute in this State (section 6934*a*, Rev. St. as adopted April 15, 1882), a "gambling contract," or wager upon the future price of the commodity, and therefore void.

2. Where the purchase or sale of a commodity is adopted as a mode of disguising a wager upon the market price of the commodity at a future time, the fact that one of the parties assumes to make the purchase or sale as a commission merchant only will not alter the real relation in which they stand as parties to a wager. Each is in law *particeps criminis* to the wager, and either may, as loser, recover from the other as "winner," under the provisions of § 4270 Rev. Stat.

MINSHALL, J., (*after stating the facts*): Two questions arise upon this record. The first relates to the right of the plaintiff to recover upon his petition, and the second relates to the right of the defendants to recover upon their counterclaim, although the plaintiff may have no right to recover upon his petition; n other words, whether the purchases and sales of grain on which the plaintiff has charged and seeks to recover commissions were wagers upon the future price of the commodities bought and sold; and, if so, whether, under the statutes of this State, the defendants may recover from him the amount claimed, as the "winner" of the money so "lost" and paid to him. Though all the evidence is set forth in a bill of exceptions, it is not the province of this court to consider it for the purpose of determining whether the finding of the jury is right as a matter of fact. If the evidence was submitted to the jury under proper instructions, we must accept its finding as an affirmation of the claim of the defendants as to the character of the alleged purchases and sales of grain, on which plaintiff seeks to recover the commissions charged in the account on which he has brought his suit. It is well settled that purchases or sales of commodities of any kind for future delivery are valid, although the seller may not own the commodity at the time the contract is made, and will have no other means of performing than by going into the market and making the requisite purchase when the time for delivery arrives. "But such a contract is valid only when the parties really intend and agree that the goods are to be delivered by the seller and the price to be paid by the buyer; and if, under the guise of such a contract, the real intent be merely to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, then the whole transaction constitutes nothing more than a wager, and is null and void." Benj. Sales, § 542. This is so well settled that we think it unnecessary to do more than refer to a few of the leading cases on the subject. Irwin v. Williar, 110 U. S. 499, 508, 510, 4 Sup. Ct. Rep. 160; Embrey v. Jemison, 131 U.S. 336, 344, 9 Sup. Ct. Rep. 776; Bigelow v. Benedict, 70 N. Y. 202, 206; Kahn v. Walton, 46 Ohio St. 195, 215, 20 N. E. Rep. 203. In this State, by an act adopted April 15, 1882, and embodied in section 6934*a*, Rev. St., such contracts are declared to be "gambling contracts," and the parties making them liable to fine and imprisonment. Its language, applicable to this case, is: "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, * * * where the intent of the parties thereto is that there shall not be a delivery of the commodity sold, but only a payment of differences by the parties losing upon the rise or fall of the market," shall be fined and imprisoned; and the contracts so made "shall be considered gambling contracts, and shall be void." So that in this State the character of such contract rests not merely upon judicial decision, but also upon statute; and there is no room for question as to what the law is in such cases. Many of the other States have similar statutes. And, indeed Mr. Bishop says: "By common consent, all bargains for the purchase and sale of things—for example, stocks and commodities— where it is the understanding of the parties, whether expressed or not, that the things are not to be delivered, but at the agreed time the 'differences' between the market values at the two periods are to be adjusted, and all other transactions of this nature, are illegal or against public policy, to the extent that courts will not enforce them. These are all gambling contracts, disturbing the course of trade, and not tolerated

by law. But," he adds, "a sale, in good faith, for future actual delivery, is valid, even though, at the time of the sale, the seller has not the article in possession." Bish. Cont. § 534, and notes. And the law is the same where the suit is by one who acted as broker to recover commissions for making the purchases or sales, where he had knowledge of the character of the transactions; for in such case he is a *particeps criminis*, and has no better right to recover than either of the other parties to the wager. Embry v. Jemison, *supra;* Kahn v. Walton, 46 Ohio St. 195, 20 N. E. Rep. 203; Pearce v. Foote, 113 Ill. 229.

The evidence in the case tended to show that the transactions between the parties were simply wagers upon the course of the grain market at Chicago, although the plaintiff and his witnesses testified that the purchases and sales are real, and that deliveries would have been made if required by the customer. The defendants testified that there was no such understanding, and that the transactions were simply wagers; and, looking at the circumstances as detailed in evidence, we are unable to see how either party could have had any other understanding. The account attached to the petition shows that in the brief period of about two months 535,000 bushels of grain were bought, and that exactly the same number were sold, without a single delivery having been made. The customer was required to deposit a certain amount in the way of "margins," and which he was to keep good, by adding thereto, when, in the course of the transactions, he met with losses. There were, it seems, 23 different, but continuous, deals. When a certain number of bushels of corn or wheat was bought for future delivery, on the next, or a few days thereafter, a like number was sold. If the sale was at a price higher than the purchase, commissions were deducted, and the remainder, if any, went to the credit of the customer's account; if for less than the purchase, the commissions were added to the difference, and the sum went to his debit. Or, if the first transaction was a sale, it would be closed by a purchase of a like number of bushels. And here, if the purchase was upon a rising market, the customer lost, if upon a declining market, he gained, and his account was in each case debited or credited accordingly. Now, when it is remembered that neither of the defendants had any actual connection with the grain business, had no need to buy or sell grain of any kind,—the one being a young physician and the other an assistant in the office of the city treasury, and without the means as the plaintiff knew, of purchasing such large quantities of grain, and as no grain was in fact delivered, each transaction being settled according to the difference in the market between the time of purchasing and the time of selling, or, conversely, between the time of selling and the time of purchasing,—what inference should be drawn from such a state of facts other than that reached by the jury? The court charged the jury that "a contract for the sale of grain or other commodity, to be delivered at a future day, is not invalidated by the fact that it was to be delivered at a future day, nor by the additional fact that at the time of the making of the contract the vendor had not the goods in his possession, nor by the additional fact that at the time he had not entered into any contract to buy or procure the goods, nor by the further fact that at the time he had no reasonable prospect of procuring them for delivery, according to the tenor of the contract. In such case, if either party to the contract has the right to compel a delivery or receipt of the goods, it is a valid contract, although the parties thereto thereafter settle and agree to close up the transaction by a payment of differences. Nor does the statute of Ohio, which has been read and commented upon in your hearing, apply to sales of grain or other goods for future delivery, where the only option is as to the time of delivery within certain limits." And then charged that "an understanding between the vendor and vendee, at the time the contract is made, that the goods shall not be delivered or received, but merely to pay or receive the difference between the price agreed upon and the market price at the time agreed upon for its delivery, brings the transaction within the statute, and is void. Nor does it matter what form the parties give to their contracts. * * * No amount of painstaking or legal exactness," they were told, could change the result, if the intention of the parties appeared to have been to deal in future options simply. The case was, in this regard, fairly submitted to the jury; and we may add that, if it was proper for us to weigh the evidence, we would not feel at all disposed to disturb the verdict. It matters little what devices may be used, or what phraseology may be adopted, for the purpose of giving to a transaction a fair mercantile appearance; if a court and jury are satisfied from all the circumstances in evidence that it is simply a wager in disguise, there is no rule of law nor principle of reason that can require them to disregard their convictions upon the subject. Persuasions so obtained are no more than the result of the aggregate proof of the evidence, by which, in every case, the verdict of the jury should be rendered; and no amount of what they may honestly believe to be perjury can require them to disregard conclusions forced upon their minds by all the evidence in the case.

The next question is, had the defendants the right on their counter-claim torecover back the sums paid the plaintiff in the way of margins? This the court charged they had the right to do, "less the amount they received by the way of profits," if the jury found under the instructions before given them that the "contracts were gambling transactions," and were known at the time to be such by the plaintiff. The plaintiff makes two objections to the right of the defendants to recover: (1) That he simply acted as agent of the defendants in making the purchases and sales,

and that the money received by him was paid to the persons with whom he dealt on behalf of the defendants; and that he is, therefore, not the "winner"—the statute, section 4270, Rev. St., simply providing for a recovery against the "winner," by the loser on any bet or wager. (2) That he paid the money over, according to the understanding, before notice or suit brought. If these purchases and sales of grain were in fact wagers on the future price of the grain ostensibly dealt in, then it is clear that the relation of principal and agent did not exist between the defendants and the plaintiff; and that they were such was found by the verdict of the jury under proper instructions from the court. The parties to a wager stand in opposed relations, each acting for himself in the matter of making it. Both may be *particeps criminis* with respect to the crime—in other words, principals in its commission—but neither acts for the other. And this is so in many offenses against public policy, as in usury and the like. It is not doubted but that in a sense either party to a wager may have an agent,—that is, either may act for himself through another; as, in this case, the defendants at first acted through Hale, who, by their direction, put up the margins for them, and so the plaintiff may have acted for or with other parties in Chicago. But under the findings of the jury that the transactions between the parties were wagers, neither could have acted for the other. The assumption of the plaintiff that he was buying or selling wheat for the defendants was a mere disguise adopted for the purpose of concealing the nature of the real transaction; and, as it had no foundation in fact, the agency based upon it is alike a mere assumption, and had no real existence. The transactions were had directly with the plaintiff, through his agent, Collins, at Cleveland. The money was received of the defendants by Collins, and transmitted to him at Chicago. If he saw fit to divide with others associated with him in making the wager, that was a matter of his own concern, but it cannot alter the case, nor affect the right of the defendants to recover from him as a "winner" under the statute.

The cases cited and relied on by counsel for the plaintiff in error are without application here, for the reason that they are all cases where there was no question about the agency of the party from whom a recovery was sought. Smith v. Bromley, 2 Dong. 696, note; Bone v. Ekless, 5 Hurl. & N. 925, 928; Whart. Ag. § 250. They establish the well-settled principal that, where money is delivered to an agent, to be applied to an illegal purpose, while the agent has no right to retain it, yet, where he has paid it over in accordance with the instructions to him, before notice from the principal not to do so, no recovery can be had against him. For example, if suit had been brought by Buel and Watkins to recover of Hale the money placed in his hands to be put up as margins with Lester, Hale, by way of defense, might have shown that he had placed the money as instructed before notice to him not to do so. But Lester can make no such defense, the character of agent having been simply assumed, to conceal the real nature of the relation between himself and the defendants, and to disguise what was known to be a crime. The relation was an assumed, and not a real, one, and is therefore no defense to the action given the loser by statute to recover of the winner money lost on a wager.

The provisions of section 4270 are not directed against any particular form of gambling. The language is: "If any person, by playing at any game, or by means of any bet or wager, loses to any other person any sum of money or other thing of value, and pays or delivers the same, or any part thereof, to the winner," the person who so loses and pays may, within the time named, recover the same "from the winner thereof." The evil is the same whether the money is wagered upon the turn of a card, the result of a horse-race, or the course of the market; and the language is broad enough to include not only either of these forms of betting, but any form in which money is lost and paid to the "winner" upon a bet or wager. A wager is generally defined by lexicographers as something hazarded upon an uncertain event; and this agrees with its legal acceptation. As defined by Anson: "A wager is a promise to pay money or transfer property upon the determination or ascertainment of an uncertain event." Anson Cont. 166. With regard to the future, the market is always a matter of uncertainty and speculation. When left to its natural course, it will fluctuate from day to day, but still more so when manipulated by gamblers, who, under the disguise of buying and selling, simply lay wagers upon its future course. Such transactions the legislature has, in section 6934*a*, Rev. St., declared to be gambling; and this section should be construed with section 4290, *Id.*, so as to suppress gambling upon the future price of grain and other commodities, as upon any other uncertain event, not merely because of its evil influence upon public morals, but because of its ruinous effect upon legitimate trade and commerce. In Pearce v. Foote, 113 Ill. 228, 239, Scott, J., in construing similar statutes of the State of Illinois, said: "Although the statutes being considered are highly penal, there is no warrant for construing them with any unreasonable strictness. They ought rather to have a just if not liberal, coustruction, to the end, the legislative intention may be accomplished,—to prohibit all dealings in options in grains or other commodities. Nothing is productive of more mischievous results. Considerable fortunes secured by a life of honest industry have been lost in a single venture in 'options.' The evil is all the more dangerous from the fact it seemingly has the sanction of honorable commercial usage in its support. It is a vice that has in recent years grown to enormous proportions. Legitimate transactions on the board of trade are of the utmost importance in commerce. Such contracts,

whether for future or immediate delivery, are valid in law, and receive its sanction and all the support that can be given to them. It is only against unlawful 'gambling contracts' the penalties of the law are denounced, and no subtle finesse of construction ought to be adopted to defeat the end it is to be hoped may be ultimately accomplished." It may well be doubted whether it required the legislative declaration contained in section 6934*a*, Rev. St., that contracts for such options as are made punishable by it should be construed to be "gambling contracts," to bring them within the remedy given the loser against the winner by section 4270, *Id.*, for, being wagers upon an uncertain event, they would come within the letter and spirit of that section, without such legislative provision; and to so hold is not to give to the statute a liberal, but a strict, construction. We see no error in the charge of the court. It was liberal to the plaintiff, and, in some respects, more so than was required by the law and facts of the case. Judgment affirmed.

NOTE.—The doctrine of the principal case cannot be doubted. The cases are practically unanimous. The proposition that an option contract, whereby the parties agree to buy or sell a commodity, deliverable at a future time, with the understanding that there shall be no actual delivery, but that they will settle by the payment of the difference between the contract price and the market price upon the date fixed for executing the contract, is void as a wager, has not only been accepted in a multitude of cases (Mohr v. Miesen, 49 N. W. Rep. 862; Wheeler v. McDermid, 36 Ill. App. 179; Hentz v. Minor, 58 Hun, 428, 12 N. Y. Supp. 474; Story v. Salomon, 71 N. Y. 420; Bigelow v. Benedict, 70 N. Y. 202; Hill v. Johnson, 38 Mo. App. 383; Flagg v. Gilpin, 19 Atl. Rep. 1084; Lyons v. Hodgen, 13 S. W. Rep. 1076; Peck v. Doran & Wright Co., 46 Hun, 454; Lawton v. Blitch, 83 Ga. 633, 10 S. E. Rep. 353; Boyd v. Hanson, 41 Fed. Rep. 174; Harvey v. Merrill, 150 Mass. 1, 22 N. E. Rep. 49; Mutual Life Ins. Co. v. Watson, 30 Fed. Rep. 653; Melchert v. American Union Tel. Co., 11 Fed. Rep. 193; Cobb v. Prell, 22 Am. L. Reg. 609), but it has been embodied in the statute law of other States as well as Ohio. Rev. St. Ill. ch. 38, §§ 130, 131; Code Ala. § 1742; 1 Rev. St. N. Y. p. 632, § 8; Act Tenn. March 30, 1883, §§ 1-3. It must be noted, however, that the rule, which is based upon principles of public policy, affects only wagering contracts. It does not affect actual trading, nor indeed legitimate speculation, as in the case of an actual purchase or sale of a commodity with a view of reaping a profit from the rise or fall in price. There is no inherent vice in the contract for future delivery. It is the intent of the parties not to deliver the subject of their contract, or that the seller may, at his election, deliver or not deliver, which taints the transaction. Stewart v. Parnell, 23 Atl. Rep. 838; Wolffe v. Perryman, 93 Ala. 290, 9 South. Rep. 148; Potts v. Dunlap, 110 Pa. St. 177, 20 Atl. Rep. 413; Jones v. Shale, 34 Mo. App. 302; Taylor v. Perquite, 35 Mo. App. 389; Lehman v. Feld, 37 Fed. Rep. 852; White v. Barber, 123 U. S. 392, 8 Sup. Ct. Rep. 221; Heidenheimer v. Cleveland, 17 S. W. Rep. 524; Brown v. Speyers, 20 Gratt. 309; Kingsbury v. Kirwan, 6 Cent. L. J. 228; Barnard v. Backhaus, 52 Wis. 593. The reason which lies at the basis of this rule of policy is plain. Such dealing amounts to mere gambling on the rise and fall of prices. "It requires no capital, except the small sums demanded to put up margins and pay differences. It promotes no legitimate trade. Any impecunious gambler can engage in it with infinite detriment to the *bona fide* dealer. It enables mere adventurers, at small risk, to agitate the markets, stimulate and depress prices and bring down financial ruin upon the unwary. It enables the unscrupulous speculator, with little or no capital, to oppress and ruin the honest and legitimate trader. Corners and black Fridays and sudden fluctuations in values are its illegitimate progeny." (Love, J., in Melchert v. American Union Tel. Co., 11 Fed. Rep. 195.) For a consideration of the economical considerations underlying such legislation, see the note to above case by Dr. Francis Wharton (11 Fed. Rep. 201), and an article on "Political Economy and Criminal Law," by the same learned author, 3 Crim. L. Mag. 1.

The intent which fixes the character of the transaction is the intent of the parties at the time of making the contract. If their purpose at that time contemplated an actual delivery of the commodity, the contract is valid, notwithstanding they subsequently see fit to settle their differences by the payment of money. Ware v. Gordon, 25 Ill. App. 534; Boyd v. Hanson, 41 Fed. Rep. 174. See also Douglas, Stuart & Forest v. Smith, 74 Iowa, 468, 38 N. W. Rep. 163.

Since these cases all turn upon the intent of the parties in making the contract, which is ultimately a question of fact for the jury (Washer v. Bond, 40 Kan. 84, 19 Pac. Rep. 323), it results that the proof of the intent and the competency and sufficiency of evidence for that purpose are usually important elements in the controversy. Of course, the terms of the contract itself cannot be taken as conclusive. Boyd v. Hanson, 41 Fed. Rep. 174; Melchert v. American Union Tel. Co., 11 Fed. Rep. 197. The direct evidence of the parties themselves, though competent (Dwight v. Badgley, 14 N. Y. Supp. 498; Kenyon v. Luther, 4 N. Y. Supp. 498, 10 N. Y. Supp. 951), is not conclusive, and the court will not hesitate, when the other evidence justifies it, to sustain a verdict in disregard of their evidence. Manifestly the most satisfactory evidence upon this subject is to be found in the nature of the transactions, the relations of the parties, the course of dealing between them, the occupation and financial ability of the principal, etc. Mohr v. Miesen, 49 N. W. Rep. 862; Boyd v. Hanson, 41 Fed. Rep. 174; Melchert v. American Union Tel. Co., 11 Fed. Rep. 197. But the mere fact that a time contract to sell gold at a certain price is optional on one side, although tending to raise a suspicion that it is a wager or bet upon the price of gold, has been held insufficient to invalidate it. Bigelow v. Benedict, 70 N. Y. 202. See also Preston v. Cincinnati, etc. R. Co., 36 Fed. Rep. 54. Such contracts being formally sufficient, the burden of proof to show that a particular transaction was void as a gaming contract rests upon the party who asserts it. Mohr v. Miesen, 49 N. W. Rep. 862; Bigelow v. Benedict, 70 N. Y. 202; Story v. Salomon, 71 N. Y. 420; Boyd v. Hanson, 41 Fed. Rep. 174; Bangs v. Hornick, 30 Fed. Rep. 97; Ward v. Vosbrugh, 31 Fed. Rep. 12; Crawford v. Spencer, 92 Mo. 498.

The taint of invalidity inherent in such contracts has been held to extend to advances made by a broker or commission merchant for his principal to aid him in "operating in futures," with notice of the real character of the transactions, so that he cannot recover them (Mohr v. Miesen, 49 N. W. Rep. 862; Wheeler v. McDermid, 36 Ill. App. 179; Hill v. Johnson, 38 Mo. App. 383); to notes and securities given in

settlement of such debts (Pearce v. Rice, 142 U. S. 28, 12 Sup. Ct. Rep. 130; Plank v. Jackson, 128 Ind. 424, 26 N. E. Rep. 568; Mackey v. Rausch, 15 N. Y. Supp. 4; Brown v. Alexander, 29 Ill. App. 626; Carroll v. Holmes, 24 Ill. App. 453; Snoddy v. American Nat. Bank, 88 Tenn. 573, 13 S. W. Rep. 127). But such paper will not be held invalid in the hands of an innocent holder for value. Pearce v. Rice, 142 U. S. 28, 12 Sup. Ct. Rep. 130. Money deposited with agents to cover "margins" in "futures" may be recovered back by the principal. Clark v. Brown, 77 Ga. 606. Mere knowledge on the part of a person loaning money that the borrower intends to use it in the purchase of options on grains in the market of another State, or to invest it in wagering or gambling contracts will not defeat a recovery. Jackson v. City National Bank, 125 Ind. 347, 25 N. E. Rep. 430. But see Lee v. Boyd, 86 Ala. 283, 5 South. Rep. 489; Tyler v. Carlisle, 9 Atl. Rep. 356.

CORRESPONDENCE.

SUNDAY WILLS.

To the Editor of the Central Law Journal:

In the note to the recent decision of Donovan v. McCarthy, 34 Cent. L. J. 371, which held that a settlement in the nature of a will was not necessarily within the Massachusetts statute declaring void all acts done on Sunday other than works of necessity and charity, the principle is laid down with seeming approval that "a contract must be complete on Sunday to avoid it. A will does not take effect on the day on which it is made if the testator does not die on that day," and goes on to hold a will, though executed on Sunday, for the reason above will be valid. The absurd, but logical, conclusion from the principle above stated is that as death completes the will, makes it binding and give force to it, if death occur on Sunday it matters not on what day the will may have been written it would come within the rule and be void because done on Sunday. To state the proposition is to reject it.

GERALD T. FINN.

BOOKS RECEIVED.

A Treatise on the Law of Non-residents and Foreign Corporations as administered in the State and Federal Courts of the United States. By Conrad Reno, of the Boston Bar. Chicago: T. H. Flood & Company. 1892.

Law of Mandamus. By S. S. Merrill, of the St. Louis Bar. Chicago: T. H. Flood & Company. 1892.

The Law of Bank Checks in the United States, as Determined by the Leading Courts of this Country and of England, with References to American and English Decisions. By Henry C. Van Schaack, of the Denver Bar. The Chain & Hardy Co., Publishers, Denver. 1892.

HUMORS OF THE LAW.

The late Sir Thomas Chambers was not a wit, and laughter seldom entered the court over which he presided so solemnly. There is, however, one good story told of him in the Temple. It is to the effect that a prisoner, who was undefended, pleaded "guilty," and, counsel having been instructed to defend him at the last moment, withdrew the plea and substituted that of "not guilty," with the result that the jury acquitted him. In discharging the prisoner Sir Thomas is said to have remarked: "Prisoner, I do not envy you your feelings. On your own confession you are a thief, and the jury has found that you are a liar."—*London Star.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION — Logging Lien.— The holder of a laborer's lien on logs cannot maintain an action to foreclose against the executor of a deceased person against whom the lien was acquired, where he has failed to present his claim to the executor, under Code 1881, ch. 104, providing that no claim holder shall maintain an action against an estate unless the claim shall have been first presented to the executor.—CASEY V. AULT, Wash., 29 Pac. Rep. 1048.

2. APPEAL—Altered Record.—The verity of the record cannot be controverted on appeal by affidavits; but where a record has been altered the remedy is to move to amend, pointing out the alleged defects, verifying the motion by affidavits.—STATE V. BLUNT, Mo., 19 S. W. Rep. 650.

3. APPEAL — Notice.— A notice of appeal stated that defendant "hereby appeals from the final judgment of the superior court of King county, in said action rendered, and entered in said action on December 12, 1891:" Held, that the notice was sufficient, notwithstanding the omission of the words "to the supreme court," since there was no other court to which an appeal could have been taken.—MCCONNELL V. KAUFMAN, Wash., 29 Pac. Rep. 1053.

4. APPEAL—Notice.—Where respondent appeared to a notice, which fixed in error the day for settlement of a statement of facts more than 30 days after date of notice, and on the day fixed by the court joined in the settlement, such appearance operates as a waiver of the error, and the statement of facts will not be stricken from the record.— BOYER V. BOYER, Wash., 29 Pac. Rep. 981.

5. APPEALS—Time of Taking.—The limitation in Gen. St. 1838, § 642, providing that all probate appeals by non-residents of the State, who were not present when the decree was passed and who did not have legal notice, must be taken within 12 months, may be waived by the acts of the parties.—APPEAL OF ORCUTT, Conn., 24 Atl. Rep. 276.

6. APPEAL— Trial by Cour t— Findings.—In an action at law, growing out of a contract for the sale of land, a finding by the trial court that the vendor's abstract "does not show any legal defects or incumbrances, and there are none in fact," and that his "title is good," is not a finding of fact, but of a legal conclusion, and, where material to the issue, is ground for reversal if the record does not show the deeds and other facts upon which the vendor's title is based.—KANE V. RIPPEY, Oreg., 29 Pac. Rep. 1005.

7. APPEALABLE JUDGMENT — State Supreme Court.— The judgment of a State supreme court, affirming an interlocutory order overruling a demurrer with permission to plead further, is not an appealable final judgment, however decisive of the merits it may appear to be. — MEAGHET V. MINNESOTA THRESHER MANUF'G CO., U. S. S. C., 12 S. C. Rep. 876.

8. APPEAL BOND. — An action may be maintained on an appeal bond filed one day too late, where such bond has operated to stay the judgment, and recites that it is given for such purpose, although the appeal is thereafter dismissed for failure to file the bond in time.— PRATT V. GILBERT, Utah, 29 Pac. Rep. 965.

9. BANKRUPTCY — Assignee. — An assignee in bankruptcy, who fails to assert his claim in a litigation in which the bankrupt becomes involved, and who delays several years after judgment is rendered in favor of the bankrupt, and till after third persons acquire interest in the judgment, is guilty of laches, and cannot claim the proceeds of the judgment as against such third person.— BEALL V. TINSTMAN, Pa., 24 Atl. Rep. 284.

10. BANK—Collections.—A bank which had received a draft for collection sent it to its correspondent bank at the residence of the drawee, and the draft was paid to such correspondent. There was no mutual accounts between the two banks, but it was the custom of the correspondent to remit the proceeds of collections at stated periods: Held that, until this remittance was made, or the principal bank had given the original owner of the draft credit for the avails, the original owner of the draft, as the owner of the proceeds thereof, was entitled to recover them from the correspondent bank. — NATIONAL EXCH. BANK OF DALLAS V. BEAL, U. S. C. C. (Mass.), 50 Fed. Rep. 355.

11. CHATTLE MORTGAGE — Fraud — Sale of Goods.—A mortgage upon a stock of goods which allows the mortgagor to remain in possession is not fraudulent as to creditors by reason of a parol agreeement whereby he is to have the privilege of selling in the usual course of trade, and is to be allowed a part of the proceeds for replenishing the stock, instead of being required to apply the entire proceeds to the mortgage, but the question of fraud depends upon the *bona fides* of the transaction.—EPHRAIM V. KELLEHER, Wash., 29 Pac. Rep. 985.

12. COMMUNITY PROPERTY —Lease.—While a husband cannot execute a valid lease of community lands, yet, where he executes a lease with a covenant for quiet enjoyment, on which he would be liable to the lessee, and the lessee did not know that the lessor was married, or that the property leased was community property when the lease was executed, he cannot, after discovering such facts, avoid the lease without first demanding a valid lease from the lessor.—ISAACS V. HOLLAND, Wash., 29 Pac. Rep. 976.

13. CONFISCATION—Rebellion.— Under Act Cong. July 17, 1862, authorizing confiscation of the estates of persons engaged in the Rebellion, the "forfeiture of real estate not to extend beyond the natural life of the offender," the condemnation and sale of a "life estate" leaves the reversion or remainder in such offender, but without the power of alienation, it being in a state of suspended animation.— JENKINS V. COLLARD, U. S. S. C., 12 S. C. Rep. 868.

14. CONSTITUTIONAL LAW—Titles of Acts.—Act 1891, ch. 101, entitled "An act to require the section master of railroads to give notice of injuries to live stock, to provide for the appointment of appraisers and the collection of the appraisements, and to make railroads liable for all injuries to stock upon or near their unfenced tracks," is not unconstitutional in embracing more than one subject. — ILLINOIS CENT. R. CO. V. CRIDER, Tenn., 19 S. W. Rep. 618.

15. CONSTITUTIONAL LAW—Titles of Acts.—An act does not embrace more than one subject because, while fixing the salaries and compensation of the officers of a county, it also provides for the consolidation of the offices of superintendent of schools and district attorney, and provides that the latter officer shall, for the salary provided, also discharge the duties formerly appertaining to the superintendent's office. — STATE V. BOARD OF COM'RS OF HUMBOLDT COUNTY, Nev., 29 Pac. Rep. 974.

16 CONSTITUTIONAL LAW — Titles of Laws. — Under Const. art. 4, § 20, requiring an act to embrace but one subject, or matters properly connected therewith, "which subject shall be expressed in the title," the title of Act Feb. 16, 1891, entitled "To protect salmon and other food fishes in the State of Oregon, and upon all waters upon which this State has concurrent jurisdiction," is sufficiently broad in its scope to include section 8, making it a misdemeanor to deposit sawdust, planer shavings, or lumber waste in the waters of this State. — STATE V. SHAW, Oreg., 29 Pac. Rep. 1028.

17. CONTEMPT — What Constitutes. — In replevin the mortgagee of the chattles replevied filed a plea of intervention. The issue of defendant's right to execute the mortgage was raised, and the court gave judgment awarding plaintiff possession. Whereupon the intervener and one R clandestinely, and before the order of the court could be complied with, took possession of the chattels under intervener's mortgage, while they were in the sheriff's custody, and removed them beyond the jurisdiction of the court: Held, that both R and the intervener were liable for contempt. — REEVES V. PEOPLE, Colo., 29 Pac. Rep. 1033.

18. CONTRACT.—Where one stands in relation to an insolvent debtor as surety or creditor, and has in his hands certain property of the debtor, which he desires to retain or have applied on his claim or obligation, a promise made by him to another creditor that, if he will not institute legal proceedings against the common debtor, he will pay the debt, if accepted, will constitute a valid contract, and a recovery may be had thereon. — MATTHEWS V. SEAVER, Neb., 52 N. W. Rep. 283.

19 CONTRACT — Acceptance. — A proposition to pay $350 for a car-load of apples, submitted by mail to the vendor, but declined the next day, and eight days later accepted by such vendor, imposes no obligation upon the parties making the same. The offer, having been declined, was at an end, unless renewed by the vendees. It is incumbent upon a party to whom a contract is submitted by post to signify his acceptance of the same within a reasonable time if he desires to take the benefit of it. — RICHARDSON V. LENHARD, Kan., 29 Pac. Rep. 1076.

20. CONTRACT—Assignment of Benefits.—Where a contractor with a railroad company is to receive capital stock of the company for labor, services, and materials furnished, and the failure to perform all of the conditions of the contract by the contractor renders it null and void, such contractor cannot sell or transfer any part of such stock so as to bind the company, before he has complied with the terms and conditions of the contract on his part.—SARGENT V. KANSAS MID LAND R. Co., Kan., 29 Pac. Rep. 1063.

21. CONTRACTS FOR CONSTRUCTION—Damages.—A contract by which plaintiffs were to do certain work and furnish certain materials in the construction of a railroad for defendant, completion of which was prevented by defendant, specified with particularity the price to be paid for the different kinds of work and materials: Held, the difference between the price and cost was recoverable as damages, and therefore exclusion of testimony tending to show this was error

—DANFORTH V. TENNESSEE & C. R. CO., Ala., 11 South. Rep. 60.

22. CORPORATIONS — Appointment of Agent.—Foreign companies, being required, in order to carry on business in this State, to have an authorized agent upon whom process may be served, do not, in appointing a board of directors to act as their agent, localize their business any more than those companies which manage their affairs through agencies not organized into boards, the duties of each agency being about the same.—LIVERPOOL, LONDON & GLOBE INS. CO. V. BOARD OF ASSESSORS, La., 11 South. Rep. 91.

23. CORPORATIONS—Evidence—Corporate Existence.—The introduction in evidence of an act ratifying and confirming the organization of a company, originally made under its act of incorporation, and expressly declaring it a legal corporation, is competent evidence of the existence of the company as a corporation.—BOYKIN V. STATE, Ala., 11 South. Rep. 66.

24. CORPORATIONS — Insurance Premium. — A manufacturing corporation organized under the laws of this State may take insurance on its property in an insurance corporation organized under Laws 1881, ch. 91, so as to be bound upon its premium notes. —ST. PAUL TRUST CO. V. WAMPACH MANUF'G CO., Minn., 52 N. W. Rep. 274.

25. CORPORATIONS — President.— The president of a corporation has no power, without the authority of the directors or stockholders, to consent to the appointment of a receiver to wind up the affairs of the corporation.— WALTERS V. ANGLO-AMERICAN MORTGAGE & TRUST CO., U. S. C. C. (Neb.), 50 Fed. Rep. 316.

26. CORPORATIONS—Statutes of Other States.—In the absence of evidence, there is no presumption that the statutes under which defendant, a corporation of another State, was organized, are like those of this State, in not allowing its corporations to deal in their own stocks.—YEATON V. EAGLE OIL & REFINING CO., Wash., 29 Pac. Rep. 1051.

27. COUNTY OFFICERS—School Funds.—It is a breach of duty for judges of the county court to use the county school funds for other county purposes than maintaining public schools.—KNOX COUNTY V. HUNOLT, Mo., 19 S. W. Rep. 628.

28. COVENANT—Evidence.—In an action on the covenants of warranty in a deed, although a judgment of eviction in a suit of which defendants had no notice, and in which they were not made parties, is insufficient, without further proof that the title under which ouster was made was paramount to that of plaintiff's grantor, to establish plaintiff's right of recovery, the omission is cured by the introduction by defendant of evidence showing the title of each party to the ejectment suit, and presenting the question of paramount title on the evidence.—WHEELOCK V. OVERSHINER, Mo., 19 S. W. Rep. 640.

29. CRIMINAL LAW—Burglary.—Pen. Code, § 459, provides that every person who enters any house, room or store with intent to commit larceny is guilty of burglary: Held, that the offense is complete when the entry is made with intent to commit larceny, even though such entry was made into a store through the public entrance while open for business.—PEOPLE V. BARRY, Cal., 29 Pac. Rep. 1026.

30. CRIMINAL LAW—Carrying Weapons.—On a prosecution for carrying a concealed weapon, a charge assuming defendant's guilt in so caarying a pistol about his person that it was concealed from persons occupying a certain position towards him, although it may have been open to the ordinary observation of others in relatively different positions, is error. The general question is, was the weapon open to the ordinary observation of persons coming in contact, in the usual and ordinary associations of life, with such a person? —SMITH V. STATE, Ala., 11 South. Rep. 71.

31. CRIMINAL LAW — Drunkenness.—One cannot be convicted of being drunk in a public place, where the evidence shows that if he was drunk at all it was while in his room at an hotel, since, when the room was set apart to him, it ceased to be a public place.—BORDEAUX V. STATE, Texas, 19 S. W. Rep. 603.

32. CRIMINAL LAW— Embezzlement.—Rev. St. 1879, § 1326, providing for the punishment of any officer who shall embezzle any portion of the public money received by him in virtue of his office, or "under color or pretense thereof," does not apply to one who, having no right to the public money by virtue of his office, obtains possession thereof by falsely representing that he has such right.—STATE V. BOLIN, Mo., 19 S. W. Rep. 650.

33. CRIMINAL LAW — False Pretense.—An indictment for swindling, which alleges that defendant, by falsely pretending to have sold certain land for a sum which would be due at some future time, induced a certain person to deliver and did acquire from such person a certain mule, with intent to appropriate the same to his use, is insufficient in failing to show whether the person mentioned was induced to part with the possession only of the property, or with the title and possession, and also whether he was to be paid out of the sum realized from the land, or at all.—CURTIS V. STATE, Texas, 19 S. W. Rep. 604.

34. CRIMINAL LAW— Larceny.—An assistant foreman of a warehouse, who has no authority to sell any of the property stored therein, but only to deliver it upon proper orders, is guilty of larceny rather than of embezzlement in attempting to sell it.—PEOPLE V. PERINI, Cal., 29 Pac. Rep. 1027.

35. CRIMINAL LAW—Presumption of Innocence.—An instruction that a person accused of crime is presumed to be innocent until proven guilty, and that this presumption goes with him all through the case "until it is submitted" to the jury, is erroneous in intimating that the presumption ceases at that time, whereas in fact it continues until a verdict is reached.—PEOPLE V. MCNAMARA, Cal., 29 Pac. Rep. 953.

36. CRIMINAL PRACTICE—Murder.—Under 2 Hill's Code, § 1244, and Hill's Pen. Code, § 1, an indictment for murder in the first degree, which alleges that defendant, in a certain county, on a certain day, "purposely, and of his deliberate and premeditated malice, killed" deceased, "by then and there purposely, and of his deliberate and premeditated malice, shooting and mortally wounding the said" deceased, "with a gun which he, the said" defendant, "then and there held in his hands," is sufficient. It need not aver that the person killed was a human being, that he died, or that defendant murdered him, or designate the part of the body upon which the fatal wound was inflicted.—STATE V. DAY, Wash., 29 Pac. Rep. 984.

37. CUSTOM—Evidence.— Where a broker represents that he has certain stock in his possession, when in fact he has no such stock, and a sale is closed on the faith of this representation, in an action to recover the price paid, evidence of a custom among brokers to sell stock in their own name, and to become personally liable to perform the contract, is inadmissible.—WOLFF V. CAMPBELL, Mo., 19 S. W. Rep. 622.

38. DEATH BY WRONGFUL ACT—Children.—In an action to recover damages for death by wrongful act, testimony as to the number and ages of decedent's children, and as to the kind treatment of his family by decedent, is admissible; the jury may take into consideration the number and ages of decedent's children in assessing the damages, they being beneficiaries of the recovery, if any, under Comp. Laws, § 2962.—CHILTON V. UNION PAC. RY. CO., Utah, 29 Pac. Rep. 963.

39. DEED—Delivery.—Where a grantee drafts a deed and sends it to the grantor to sign, with instructions to have it recorded, the grantee thereby constitutes the recorder her agent, and a delivery by the grantor to the recorder is valid.—PRIGNON V. DAUSSAT, Wash., 29 Pac. Rep. 1046.

40. DEED—Quitclaim.—A purchaser of real estate in Arkansas is not charged with notice of prior equities not of record, merely because his deed is in the form of a quitclaim, if it does not appear that he directed a

deed of that kind.—McDONALD v. BELDING, U. S. S. C., 12 S. C. Rep. 892.

41. DIVORCE—Alimony—Judgment.—Comp. St. div. 5, §§ 1000, 1004, 1006, declaring that divorces may be decreed on certain grounds, and that when decreed alimony and maintenance may also be decreed, do not mean that the obligation of maintenance can be enforced only upon condition of a divorce first obtained but merely declare that the obligation shall continue after that time; and the jurisdiction, therefore, which courts have, to enforce the obligation where the wife has been deserted and left destitute without cause, is not disturbed.—EDGERTON v. EDGERTON, Mont., 29 Pac. Rep. 966.

42. DIVORCE—Joinders of Actions.—In an action for divorce and alimony, there is no misjoinder of causes in making defendants persons to whom plaintiff claims her husband has fraudulently conveyed all his property in the State, and asking that the conveyances be set aside, that she may have alimony out of the property.—PROUTY v. PROUTY, Wash., 29 Pac. Rep. 1049.

43. DRAINAGE—Establishment of Ditch.—Where a person purchases land after proceedings have been commenced for the establishment of a ditch, he cannot, after the ditch has been constructed, and the land assessed for part of the cost, object that he had no notice of the proceedings, since he was a purchaser *pendente lite*, and is bound by the judgment.—SHIRK v. WHITTEN, Ind., 31 N. E. Rep. 87.

44. DRAINAGE ASSESSMENTS — Defenses.—Under the drainage act of April 8, 1881, as amended by act of March 8, 1883, providing that a drainage commissioner may levy and enforce assessments from time to time as the work of building a drain progresses, such commissioner has authority to exercise a reasonable discretion in levying assessments to secure money to pay for work in progress; the statute, considered as an entirety, not inhibiting the exercise of such authority until the money is required to pay for work actually done.—RACER v. STATE, Ind., 31 N. E. Rep. 81.

45. EJECTMENT—Parties.—Where the person claiming title to land is insane and confined in an asylum, and his wife is in the actual possession of the land, she is a proper party defendant to an action to recover possession.—BENSIECK v. COOK, Mo., 19 S. W. Rep. 642.

46. EMINENT DOMAIN—Condemnation Proceedings.—Action will not lie to enjoin proceedings for the condemnation of a portion of a highway for railroad purposes at the suit of persons who have a reversionary interest in the land, or who will be specially injured by an obstruction of the highway, as such persons have an adequate remedy by making themselves parties to the condemnation proceedings, and therein asserting their rights.—CONNER v. COVINGTON TRANSFER RY. CO., Ky., 19 S. W. Rep. 597.

47. EXECUTORS—Qualifications — Gen. St. § 549, providing that the probate court shall appoint an administrator *c. t. a.* in the place of an executor who is "incapable to accept the trust," does not empower the court to reject an executor named in the will on the ground that he is lacking in "honesty, integrity and business experience;" the purpose of the section being only to authorize the appointment of an administrator when the person named as executor is disqualified by law.—APPEAL OF SMITH, Conn., 24 Atl. Rep. 273.

48. EXECUTION—Sale En Masse.—Since an execution sale *en masse* of separate parcels of land is not void, but only voidable, one who seeks to set it aside must show that none of the conditions which would authorize a sale of all the parcels together existed at the time of the sale.—HUDEPOHL v. LIBERTY HILL CONSOLIDATED MINING & WATER CO., Cal., 29 Pac. Rep. 1025.

49. FEDERAL COURTS—Following State Decisions.—The law of the States as to possession of lands under color of title, being a rule of property, are of controlling authority in the federal courts.—SANTEE RIVER CYPRESS LUMBER CO. v. JAMES, U. S. C. C. (S. Car.), 50 Fed. Rep. 360.

50. FEDERAL COURTS — Jurisdiction—Citizenship. — When, on arranging the parties according to their interests in the controversy, the jurisdiction of the federal court will be taken away because of the citizenship of one party, such party may be dismissed, and the question will then remain whether she is a necessary party.—CLAIBORNE v. WADDELL, U. S. C. C. (Ga.), 50 Fed. Rep. 368.

51. FEDERAL COURTS — Jurisdiction—Partition.—The circuit courts of the United States, sitting as courts of equity, have jurisdiction of suits for the partition of land.—DANIELS v. BENEDICT, U. S. C. C. (Colo.), 50 Fed. Rep. 347.

52. FEDERAL JURISDICTION—Suits against Receivers. —A suit against the receivers of the Texas & Pacific Railway Company for personal injuries is one arising under the constitution and laws of the United States, and within the federal jurisdiction, since the corporation derived its corporate powers from acts of congress, the receivers were appointed by a federal court, and jurisdiction over the action without leave of the appointing court is maintainable only by reason of an act of congress.—TEXAS & P. RY. CO. v. COX, U. S. S. C., 12 S. C. Rep. 905.

53. FIXTURES — Reservation by Parol.— A wooden barn, resting on large stones at the corners, and smaller ones at other places, is a part of the realty; and where a part of the land on which it is situated is conveyed by successive warranty deeds with a parol reservation of ownership of the barn in the first grantor, but no reservation thereof in the deeds, such grantor nevertheless has no right to remove so much of the same as rests on the land conveyed.— LEONARD v. CLOUGH, N. Y., 31 N. E. Rep. 93.

54. FRAUDS, STATUTE OF.—An oral contract by which plaintiffs agree to prepare the plans of a building for defendants, and to superintend the construction thereof, in consideration of a conveyance to them of a certain lot, is void under the statute of frauds.—KOCH v. WILLIAMS, Wis., 52 N. W. Rep. 257.

55. FRAUDS, STATUTE OF —Where a husband conveys land for the use of his wife, on her parol promise to devise a third of her property to him, such promise is void under the statute of frauds.—MANNING v. PIPPEN, Ala., 11 South. Rep. 56.

56. FRAUDULENT CONVEYANCES — Evidence.— A conveyance to a wife of land purchased with her husband's money, without any valuable consideration as between them, is fraudulent as to his creditors; and though, being a minor, she subsequently makes a voluntary conveyance to another, in whose hands they are seized and sold on execution by the creditors, she cannot, after discoverture and on attaining majority, maintain a bill to recover them or their value.—PHILLIPS v. RHODES, Colo., 29 Pac. Rep. 1011.

57. FRAUDULENT CONVEYANCE—Intent.—As to existing creditors, a voluntary deed will be presumed to be fraudulent, whether it was executed with an actual intent to defraud or not.—BOUQUET v. HEYMAN, N. J., 24 Atl. Rep. 266.

58. GAME LAWS—Fish.—Act May 31, 1887, as amended by act of June 3, 1889, which forbids during a certain part of the year catching fish with a seine "in or upon any of the rivers, creeks, streams, ponds, lakes, sloughs, bayous, or other water-courses" of the State, applies to a lake near an unnavigable river, which is only connected with the lake during periods of high water for a few days or weeks at a time, although the seine fishing done in such lake is done with the permission of the owner of the land under and on all sides of the lake.—PEOPLE v. BRIDGES, Ill., 31 N. E. Rep. 115.

59. HIGHWAY—Railroad Companies.—Where a highway is established across a railroad company's right of way, it is entitled to compensation for all necessary expenditures in constructing cattle-guards and such other things as it is required by statute to construct on account of the highway.—ATCHISON, T. & S. F. R. CO. v. BOARD OF COM'RS OF OSAGE COUNTY, Kan., 29 Pac. Rep. 1084.

60. HOMESTEAD — Abandonment.—Where the owner of a business homestead, on account of sickness, temporarily quits his business and leases his property, at first for one year, afterwards by the month, and it is shown that he intended to re-engage in the business as soon as he recovered his health, and it does not appear that he was at any time able to resume business, there is no abandonment of the homestead.—MALONE V. KORNRUMPF, Tex., 19 S. W. Rep. 607.

61. INFANT—Improvements—Lien.—On a lot belonging to an infant, without guardian, living with his mother and stepfather, all of whom were destitute and homeless, plaintiff made expenditures in the way of necessary improvements to the house, under a contract with the mother, to whom plaintiff thought it belonged: Held, that the value of the improvements to the premises would be allowed out of its rents.—SHUMATE V. HARBIN, S. Car., 11 South. Rep. 270.

62. INTERSTATE COMMERCE ACT — Long and Short Hauls.—To render lawful a greater charge for a shorter than for a longer haul, under section 4 of the interstate commerce act, it is not necessary to first obtain authority from the commission. Such charges are lawful if the circumstances and conditions are not in fact "substantially similar," and the carrier may determine the question for himself, subject to a liability for violating the act, if, on investigation, the fact be found against him.—INTERSTATE COMMERCE COMMISSION V. ATCHISON, T. & S. F. R. CO., U. S. C. C. (Cal.), 50 Fed. Rep. 295.

63. INTOXICATING LIQUORS—Illegal Sale.—Under acts 1880-81, p. 170, § 1, which declares it unlawful to manufacture or sell "any intoxicating decoction, mixture, compound, or bitters whatever, in any quantity or for any use or purpose, within the limits of the counties of Clark and Limestone," a person who sold as medicines, in quantities less than a quart, a "strengthening cordial" and a "ginger tonic" which contained sufficient alcohol to and did intoxicate persons using them, was rightly convicted, irrespective of his belief, motive or intention.—COMPTON V. STATE, Ala., 11 South. Rep. 69.

64. INTOXICATING LIQUORS — License.—A city ordinance prohibiting the sale of spirituous liquors in quantities of one gallon or more, without first obtaining a license, and providing a penalty for its violation, is within the powers conferred by Rev. St. Ill. ch. 24, upon the city council "to license, regulate and prohibit the selling or giving away" of such liquors.—MILLER V. AMMON, U. S. S. C., 12 S. C. Rep. 884.

65. INTOXICATING LIQUORS—Minor.—Where an indictment charged defendant with selling liquor to a minor, and the evidence showed that the sale was made by defendant's agent, the indictment sufficiently informed defendant of the nature and cause of the accusation against him, Rev. St. § 4589 providing that the agent's sale shall be taken to be the act of the master.—STATE V. MCCANCE, Mo., 19 S. W. Rep. 648.

66. JUDGMENT—Jurisdiction.—The doctrine that, in a suit on a judgment by a court of another State, defendant may prove want of jurisdiction either of the subject-matter or person in the court that rendered the judgment, applies to suits on judgments rendered by the federal courts of another State.— SOUTHERN INS. CO. OF NEW ORLEANS V. WOLVERTON HARDWARE CO., Tex , 19 S. W. Rep. 615.

67. JUDGMENT FOR ALIMONY — Lien.—C obtained, in 1858, a judgment for alimony in Ohio against J B, her husband. The last execution was issued in 1860. J B, the husband, died in 1877. No proceedings were ever taken to revive the judgment. An action was commenced in this State in 1885 to subject the lands of J B, alleged to have been fraudulently conveyed by him, to the payment of the judgment for alimony: Held, on account of the dormancy of the judgment in Ohio, and the failure to revive the same, it was not a legal or equitable lien upon any lands in Kansas; and held, further, that it could not be enforced by any action in this State.—CHAPMAN V. CHAPMAN, Kan., 29 Pac. Rep. 1071.

68. LANDLORD AND TENANT—Defective Premises.—In an action against the lessor of an hotel, who had agreed to keep it in repair, for personal injuries received by a guest by stepping into an elevator well, the spring to close the door to which was defective, evidence that the lessee notified the lessor some eight months before the accident of such defect; that a workman was sent, who repaired the doors; and that the lessee knew of no defect at the door where the accident occurred, was sufficient to show that the lessor had notice of the defective spring, and was negligent in not repairing it. —HUTCHINSON V. CUMMINGS, Mass., 31 N. E. Rep. 127.

69. LANDLORD AND TENANT — Foreclosure.— Plaintiff purchased land under a power of sale in a mortgage, given by one P, and which contained this clause: "The completion of said sale by conveyance shall entitle the purchaser to immediate possession of the premises, and any holding of the same thereafter by the said P shall be as tenant of said purchaser:" Held, that the relation of landlord and tenant was established between plaintiff and P.—BREWSTER V. MCNAB, S. Car., 15 S. E. Rep. 233.

70. LANDLORD AND TENANT — When Relation Exists.— An agreement purporting to have been made in aid of a railroad in expectation of benefits to accrue to certain mineral lands of the obligor, and providing for the execution of a mining lease in case the road should be completed within a year, but if not so completed the agreement to be void, does not show the relation of landlord and tenant so as to entitle the obligor to maintain an action for rent. — PROCTOR V. BENSON, Pa., 24 Atl. Rep. 279.

71. LIBEL BY CORPORATIONS. — The stockholders and officers of a corporation are not responsible for libelous matter published and circulated by the corporation, unless they are shown to have in some way aided and advised its publication, or unless their duties as officers of the concern were of such character as charges them with the performance of functions concerning the publication and circulation of the paper.—BELO V. FULLER, Tex., 19 S. W. Rep. 616.

72. MANDAMUS—Bill of Exceptions.— A judge who refuses to settle a bill of exceptions because not presented in proper time, and because the delay was inexcusable, cannot be compelled to do so by *mandamus*, unless the refusal involve an abuse of discretion. — BROWN V. PREWETT, Cal., 29 Pac. Rep. 951.

73. MANDAMUS TO JUSTICE OF THE PEACE.—*Mandamus* will not lie to compel a justice of the peace to approve a traverse bond in a proceeding on a writ of forcible detainer, where there is no admission of its sufficiency, as the determination of the sufficiency of the surety requires an exercise of judicial discretion.—MCDONALD V. JENKINS, Ky., 19 S. W. Rep. 594.

74. MANDAMUS TO MAYOR. — Where a city council passes, over the mayor's veto, an ordinance providing for the issue of bonds in excess of the amount of indebtedness which the city can lawfully incur, *mandamus* will not lie to compel the mayor to sign the bonds. —CHALK V. WHITE, Wash., 29 Pac. Rep. 979.

75. MARRIAGE — Validity. — A wife who has married to and lived with her husband in Australia, afterwards left him, and went to live with her parents, who also resided in Australia. The husband then removed to California, where he married again, eight years afterwards: Held, that the first wife was "absent" from her husband, within Civil Code, § 61, which provides that a second marriage during the life of a former spouse is valid until legally annulled where the former spouse was absent, "and not known to such person to be living, for the space of five successive years immediately preceding such subsequent marriage."—JACKSON V. JACKSON, Cal., 29 Pac. Rep. 957.

76. MARRIED WOMAN. — Where E, a married woman, made application in writing to borrow money, naming her agent therein in the transaction, and describing the property which she proposed to mortgage, and afterwards signed the papers, received the money in person, and gave a receipt thereof, which stated that

the money was for herself, the name of her husband not being mentioned in the transaction it was sufficient to warrent the court in holding that the money was borrowed by E, and not by her husband.—ELLIS V. AMERICAN MORTG. CO. OF SCOTTLAND, S. Car , 11 South. Rep. 267.

77. MARRIED WOMAN — Actions — Pleading.—Plaintiff need not allege or prove, in an action based upon the contract of a married woman, that the contract was made with reference to the woman's separate estate, unless the disability of coverture be first set up. — BRICE V. MILLER, S. Car., 11 South. Rep. 272.

78. MASTER AND SERVANT— Negligence—Assumption of Risk.—Where a minor, knowing that the apparatus for ascending and descending the shaft was insufficient and dangerous, though having made complaint, and been promised that the defects should be remedied, continues in the employment after the lapse of a reasonable time for making the improvements, he assumes the risk of such defects and danger.— DAVIS V. GRAHAM, Colo., 29 Pac. Rep. 1007.

79. MASTER AND SERVANT — Risk of Employment. — Where a servant, of sufficent intelligence to understand the dangers of his employment, knowingly occupies a place set apart for him by the master, he thereby assumes all risks incident to his work, and dispenses with any obligation of the master to furnish him with a better place.— EMMA COTTON SEED OIL CO. V. HALE, Ark., 19 S. W. Rep. 600.

80. MECHANIC'S LIEN.—A lien which has accrued to a partnership, for lumber and material furnished, is not lost by the retirement of one of the persons composing the copartnership, and the associating of another person with the remaining partner, who continue the business under the same name, and as the successors of the old firm. A statement for a mechanic's lien may be filed within the statutory time by the new firm, as the successors in interest of the firm furnishing the lumber and material.— BROWN V. SCHOOL DIST. NO. 84 OF NEOSHO COUNTY, Kan., 29 Pac. Rep. 1069.

81. MINING CLAIMS — Forfeiture.—Rev. St. U. S., § 2324, requiring an expenditure upon mining claims of $100 in labor or improvements each year "until a patent has been issued therefor," in default whereof the claim may be relocated, is applicable only to a mere possessory title, and not to a claim for which the price has been paid and a certificate of purchase issued, since a perfect right to a patent then accrues, and a failure to receive it is only due to delay in the administration of the land department.—BENSON MINING & SMELTING CO. V. ALTA MINING & SMELTING CO., U. S. S. C., 12 S. C. Rep. 877.

82. MORTGAGE — Foreclosure — Priority of Claims.— The general freight and passenger agent of a navigation company which has passed into the hands of a receiver has a valid claim for the arrears of his salary, but has no equity to be paid in priority to the mortgage creditors.—BOUND V. SOUTH CAROLINA RY CO., U. S. C. C. (S. Car.), 50 Fed. Rep. 312.

83. MORTGAGE— Priorities —Where indebtedness under a note and a mortgage given to secure it is settled, and a new note and mortgage on the same premises are given, and a release of the prior indebtedness executed, the new mortgage ranks after one executed subsequently to the first mortgage, of which the first mortgagee had notice, there being no evidence of fraud nor of accident or mistake of fact; and it does not matter that the second mortgagees aided the mortgagors in the settlement of the first mortgage, where they took no wrongful advantage. — NEW ENGLAND MORTGAGE SECURITY CO. V. HIRSCH, Ala., 11 South. Rep. 63.

84. MUNICIPAL CORPORATIONS. — The validity of Rev. St. 1891, ch. 24, art. 9, § 54, relating to the organization of cities and villages, which authorizes a city to adopt said article by ordinance without requiring a vote of the people, if originally doubtful, has been determined by direct and incidental recognition for 20 years, and is not an open question.—LINCK V. CITY OF LITCHFIELD, Ill., 31 N. E. Rep. 123.

85. MUNICIPAL CORPORATION—Defective Street.—In an action against a city for injuries sustained by the negligent digging of a ditch in its street, the court properly refused to submit to the jury the question whether or not an independent contractor, and not the city, was liable, when, at the time the accident occurred, the requirements of the city charter, that "all contracts relating to city affairs shall be in writing," and shall be countersigned by the comptroller, and filed and registered by number, date, and contents in the mayor's office had not been complied with; the advertisement, bid, and letter of acceptance being insufficient to constitute a valid contract.—HEPBURN V. CITY OF PHILADELPHIA, Pa., 24 Atl. Rep. 279.

86. MUNICIPAL CORPORATIONS — Ordinance. — A city cannot under its police power, by ordinance, require a ditch which was constructed through lands embraced within the public domain of the United States prior to such lands being embraced within the city limits, to be so confined and reconstructed, by boxing, fluming, or otherwise, as to prevent the further washing and cutting away of the property along the line of such ditch. —PLATTE & D. CANAL & MILLING CO. V. LEE, Colo., 29 Pac. Rep. 1036.

87. MUNICIPAL POWERS— Street Railways—Exclusive Privileges.—The power of regulating the streets delegated to the city of New Orleans by the legislature of the State embraces authority to establish street railways on its streets, but it does not include authority to grant to any person or corporation an exclusive privilege to operate a railway on any street.—NEW ORLEANS CITY & L. R. CO. V. CITY OF NEW ORLEANS, La., 11 South. Rep. 78.

88. NATIONAL BANKS — Stockholder's Liability.—In an action by the receiver of a national bank to enforce an assessment under Rev. St. § 5151, against one credited on the transfer books as a stockholder, it appeared that nearly a year before the failure he had sold his stock to a broker for an undisclosed principal, that he indorsed the same, and requested the broker to inform the cashier of the transaction, and to have the stock transferred; that the broker accordingly handed the stock to the cashier, gave him the necessary information, and requested him to make the transfer. This the cashier promised to do, but in fact the transfer was never made. The certificate recited that it was transferable on the books of the company "by indorsement hereon and surrender of this certificate:" Held, that in requesting the cashier to make the transfer the broker acted as the seller's agent, and that the latter did all that was required of him as a prudent business man, and could not be held liable as a stockholder.—YOUNG V. MCKAY, U. S. C. C. (Cal.), 50 Fed. Rep. 394.

89. NEGLIGENCE — Dangerous Premises. —A person who enters a building containing offices, to inquire about a servant of the occupier of one of the offices, who keeps no servant's registry and who has no connection with such business, the building not being used or designed in any part for such purpose, is a mere licensee therein; and the owner is not liable for injuries received by her through the unsafe condition of the building.— PLUMMER V. DILL, Mass., 31 N. E. Rep. 128.

90. NEGLIGENCE—Dangerous Premises.—While plaintiff's decedent, without consent, was on the roof of defendant's building for a ball which had lodged there, he came in contact with a live electric wire used to conduct electricity from defendant's works to an adjoining building, and was killed: Held, that the wire was a lawful apparatus used in defendant's ordinary business, and as decedent was, at most, a mere licensee, defendant was not liable for the death.—SULLIVAN V. BOSTON & A. R. CO., Mass., 31 N. E. Rep. 128.

91. NEGLIGENCE—Electric Wires.—The violation of a duty specified by law is negligence; therefore, when a city ordinance under which an electric lighting com-

pany is operated requires it to have the "splices" on its wires perfectly insulated, the failure to do so is negligence.—CLEMENTS V. LOUISIANA ELECTRIC LIGHT CO., La., 11 South. Rep. 51.

92. NEGLIGENCE — Injury to Insane Person. — One whose mind is merely dull, and who is capable of earning his livelihood, there being no apparent necessity of putting him under the protection of a guardian, is chargeable with the same degree of care for his personal safety as are others of brighter intellect; but if he is so devoid of intelligence as to be unable to apprehend apparent danger, one through whose negligence he is injured, having notice of his mental incapacity, cannot escape liability on the ground of his contributory negligence.—WORTHINGTON V. MENCER, Ala., 11 South. Rep. 72.

93. NEGOTIABLE INSTRUMENT—Contract to Forbear.—A contract to forbear to sue on a note for a definite time, for a valuable consideration, cannot be pleaded in bar to an action on the note before the time of forbearance has elapsed; the only remedy being an action on the covenant for damages.—BROWN V. SHELBY, Ind., 31 N. E. Rep. 89.

94. NEGOTIABLE INSTRUMENT—Limitations.—When it appears upon the face of a note sued on that it is barred by the statute of limitations, and the only evidence that it is not barred consists in alleging promises in writing to pay made within the statutory period, and such alleged promises are denied under oath, the plaintiff is not entitled to a judgment on the pleadings; and the fact that the defendant added, to his said denial under oath, the plea of payment within the statutory period, will not entitle the plaintiff to a judgment on the pleadings.—SMITH V. BEELER, Kan., 29 Pac. Rep. 1087.

95. PARTNERSHIP — Counter-claim. — Decedent withdrew from a firm of which he was a member, and the business was continued by a partnership composed of his former partner and another, the latter of whom promised decedent to pay one-half of a certain indebtedness of the firm: Held, in an action against decedent's estate for goods sold him by the new firm, that there could be no counter-claim because of the payment of said debt by the old firm by decedent, as the members of the new firm, individually, were bound to reimburse him and not the firm.—BOYKIN V. PERSONS, Ala., 11 South. Rep. 67.

96. PARTNERSHIP—Dissolution—Fraud.—Where a person has been induced, by fraudulent representations, to enter into a partnership, equity has jurisdiction to rescind the contract at his instance, and put an end to it *ab initio*.—OTERI V. SCALZO, U. S. S. C., 12 S. C. Rep. 895.

97. PLEADING—Aider by Verdict.—Under Comp. Laws, § 3258, providing that defects in pleadings, not affecting the substantial rights of the parties, shall be disregarded, when a complaint fails to properly allege notice of protest to an indorser, the defect is cured by a judgment after verdict.—HARKNESS V. MCCLAIN, Utah, 29 Pac. Rep. 964.

98. PLEADING—Exhibits.—The complaint in an action to establish a right of way and to enjoin its obstruction must contain a description of the land over which it is claimed, and its omission is not cured by reference to so-called "exhibits" as parts of the complaint, containing descriptions of the land.—BAYLESS V. PRICE, Ind., 31 N. E. Rep. 88.

99. PLEDGE OF CORPORATE STOCK.—A corporation is liable to a pledgee of stock, who appears on its books as the owner thereof, for dividends paid the pledgeor, to which the former was admittedly entitled, and is not relieved from such liability by the fact that the pledgee received part payment of the debt, surrendered a note evidencing the same, and accepted another for the balance, when he retained the stock as collateral, and had no knowledge that the dividends had been so paid.—BOYD V. CONSHOHOCKEN WORSTED MILLS, Pa., 24 Atl. Rep. 287.

100. POWER OF ATTORNEY EXECUTED IN BLANK.—A guardian was authorized, by order of court, to appoint an attorney to convey land of the ward, and executed a blank power, no person being named as attorney; and another person, the guardian not knowing of and taking no part in selecting an attorney, inserted a name in the blank left for the name of the attorney: Held, that the instrument was not valid as a power of attorney.—COX V. MANVEL, Minn., 52 N. W. Rep. 273.

101. PRINCIPAL AND SURETY — Release of Surety.—Where property is sold and the purchaser agrees to pay the consideration therefor, or a portion thereof, to a creditor of the vendor, the purchaser, as between himself and the vendor, becomes the principal debtor, and the vendor only a surety; and if the creditor afterwards, and because of this arrangement, accepts the purchaser as a debtor, he must accept him in the same manner, and as his principal debtor, with the vendor only as a surety; and if the creditor then, by a valid agreement with the purchaser, and without the consent of the vendor, extends the time for the payment of the debt, he will release and discharge the vendor.—UNIONTOWN STOVE & MACHINE WORKS V. CASWELL, Kan., 29 Pac. Rep. 1072.

102. PUBLIC LANDS — Homestead Entries.—The right given by section 2306 of the Revised Statutes of the United States to enter additional lands sufficient to make up, with the original homestead entry, 160 acres, is assignable.—WEBSTER V. LUTHER, Minn., 52 N. W. Rep. 271.

103. PUBLIC LANDS — Indian Scrip.—One who comes into possession of inalienable, unlocated land scrip issued to an Indian, together with a power of attorney from him, wherein the name of the attorney, the description of the land and the number of the scrip are left blank, and of a quitclaim deed wherein the grantee and the description are blank, is chargeable with notice that these instruments were designed as a means of evading the law against the alienation of the scrip; and if he locates the scrip in the name of such Indian, and then fills out the blank and causes a deed to be made to himself, he holds the lands as trustee for the Indian.—FELIX V. PATRICK, U. S. S. C., 12 S. C. Rep. 862.

104. PUBLIC LANDS — Land Office Regulations.—Department regulations for the disposal of public lands must be appropriate, reasonable, and within the limitations of the law for the enforcement of which they are provided, and when otherwise they are void.—ANCHOR V. HOWE, U. S. C. C. (Idaho), 50 Fed. Rep. 366.

105. PUBLIC LANDS—Taxation.—The interest of a lessee in lands leased from the United States is not exempt from assessment for taxation.—GARLNAD COUNTY V. GAINES, Ark., 19 S. W. Rep. 602.

106. RAILROAD COMPANIES — Fires — Constitutional Law.—Gen. St. § 2798, p. 812, providing that "every railroad company operating its line of road, or any part thereof, within the State, shall be liable for all damages by fire that is set out or caused by operating any such line of road, or any part thereof, and such damages may be recovered by the party damaged, by the proper action in any court of competent jurisdiction," is not unconstitutional, in that it deprives persons of property without due process of law.—UNION PAC. RY. CO. V. ARTHUR, Colo., 29 Pac. Rep. 1031.

107. RAILROAD COMPANIES—Forfeiture of Franchise.—When the City of New Orleans grants a privilege to a corporation to construct a street railway through a street, the neglect of the corporation to comply with its obligations can be taken advantage of only by the city.—NEW ORLEANS & L. R CO. V. CITY OF NEW ORLEANS, La., 11 South. Rep. 77.

108. RAILROAD COMPANIES—Killing Stock.—Acts 1891, ch. 101, making companies operating unfenced roads absolutely liable for the killing or injuring of any stock at or near their tracks, "caused by any moving train or engine or cars upon such track," applies only where the stock is killed or injured by actual collision with a moving engine or car.—NASHVILLE, C. & ST. L. R. CO. V. SADLER, Tenn., 19 S. W. Rep. 618.

109. RAILROAD COMPANIES — Negligence.—A person who, with knowledge that a certain trestle is used as a switch track, gets upon the planking at the ends of the ties immediately upon the passage of a switch engine, and walks on down in the direction the engine has taken until he reaches a place where he could have saved himself on either side of the track, is guilty of negligence in attempting to cross to the opposite side as the engine is coming back; and this is not excused by the fact that no signal was given.—LEWIS v. PUGET SOUND S. R. CO., Wash., 29 Pac. Rep. 1062.

110. SALE OF STOCK— Corporate Books.—A sale and transfer of corporate stock, although not entered on the books of the corporation, is effectual as between the parties, and takes precedence of a subsequent attachment in behalf of a creditor of the vendor.—LUND v. WHEATON ROLLER MILL CO., Minn., 52 N. W. Rep. 268.

111. SLANDER.—Under Rev. St. Ill. ch. 126, § 1, which makes a false charge of fornication constitute slander, it is slander to charge an unmarried woman with being pregnant.—RANSON v. MCCURLEY, Ill., 31 N. E. Rep. 119.

112. SPECIFIC PERFORMANCE — Defective Title.—Specific performance will not be decreed where the title which the complainant has agreed to convey depends for its validity upon information which is not fully presented to the court, and upon the doubtful construction of the limitations of a deed and the terms of a statute, each of which is not only peculiar, but is also inartificially drawn.—PAULMIER v. HOWLAND, N. J., 24 Atl. Rep. 268.

113. TAXATION — Assessment and Levy.—Rev. St. 1891, ch. 139, art. 4, § 3, authorizes the electors present at the annual town meeting to levy a tax for all township purposes. Article 13, § 7, of said chapter, directs the board of town auditors to make and file with the town clerk a certificate of claims, audited by them, and provides that "the aggregate amount thereof shall be certified to the county clerk at the same time, and in the same manner, as other amounts required to be raised for town purposes, which shall be levied and collected as other town taxes:" Held, that the board of town auditors have no power to levy town taxes."—PEORIA, D. & E. Ry. CO. v. PEOPLE, Ill., 31 N. E. Rep. 113.

114. TAXATION—Assessment.—A city charter provided that the assessor should make his assessment and return his lists to the proper officer by a certain time: Held, in the absence of words importing that the required act shall not be done at any other time than that designated, that the assessment might be made after the prescribed period; such provision being directory only, and not for the benefit of the tax-payer, but for the purpose of facilitating the transaction of the public business.—ANDERSON v. CITY OF MAYFIELD, Ky., 19 S. W. Rep. 598.

115. TAXATION — Joint-stock Association. — A joint-stock association, formed by private agreement between individuals is not taxable under 1 Rev. St. pt. 1, ch. 13, tit. 4, § 1, providing that all moneyed or stock corporations, deriving an income or profit from their capital, or otherwise, shall be liable to taxation on their capital in the manner therein prescribed.—PEOPLE v. COLEMAN, N. Y., 31 N. E. Rep. 96.

116. TAXATION—Redemption from Tax Sale.—In a suit to redeem land sold to the State for taxes, brought under the act of February 15, 1887, the plaintiff is not entitled to recover his costs where he has neither paid nor offered to pay, as required by said act, the attorney's fee incurred in foreclosing the tax lien.—MUSKEGON LUMBER CO. v. MYERS, Ark., 19 S. W. Rep. 602.

117. TAXATION — Situs of Corporeal Movables. — The legislature has the power to separate the *situs* of corporeal movables from the domicile of the owner for the purpose of taxation.—RAILEY v. BOARD OF ASSESSORS, La., 11 South. Rep. 93.

118. TELEGRAPH COMPANIES— Regulations.—The general telegraphic companies act of New York requires that companies organized thereunder shall not construct their lines "so as to incommode the public use" of any highways; and the amendment of 1881, authorizing the construction of underground conductors, provides that no such use may be made on streets without first obtaining permission from the proper municipal authorities: Held that, in view of these provisions, as well as upon the general theory of the police power, a company which has already obtained permission from a city council to occupy the streets on certain conditions is subject to subsequent regulations prescribed by the legislature, not amounting to an impairment of its substantial rights.—PEOPLE v. SQUIRE, U. S. S. C., 12 S. C. Rep. 880.

119. TOWNS— Liabilities. — A township is not liable under chapter 238 of the laws of 1878 for losses arising from the failure of a road overseer to erect and maintain water marks at the fords of streams that in high water becomes impassable, to indicate the depth of the water at such fords.— TOWNSHIP OF QUINCY v. SHEEHAN, Kan., 29 Pac. Rep. 1084.

120. TRIAL — Jury — Special Venire.—Under Laws 16th Sess. p. 168, providing that if, during a trial, where a jury has been drawn, it shall become necessary to summon additional jurors, such jurors may be summoned by open *venire*, a court is not obliged, before calling a case, to await the return of a portion of the regular panel, who may be out deliberating upon a case which has been previously tried, but a special *venire* may be issued.—O'DONNELL v. BENNETT, Mont., 29 Pac. Rep. 1044.

121. TRUSTS — Application of Proceeds.—Where the power of a trustee to sell extends to the purposes of the trust generally, the purchaser is not bound to see to the application of the purchase money.—NATIONAL BANK OF COMMERCE v. SMITH, R. I., 24 Atl. Rep. 273.

122. WATERS—Irrigation District.—An irrigation district, formed under the provisions of Act March 20, 1890, providing for the organization and government of irrigating districts, and for the issue and sale of bonds, is not a "municipal corporation" within the meaning of Const. art. 8, § 6, which provides that "no county, city, town, school district or other municipal corporation" shall incur an indebtedness in excess of 5 per centum of its taxable property.—BOARD OF DIRECTORS OF MIDDLE KITTITAS IRRIGATION DIST. v. PETERSON, Wash., 29 Pac. Rep. 995.

123. WATERS— Navigable Waters—Obstruction.—Rivers and streams, when of such size and channel that they may be used for the purpose of floating logs or in the transportation of any article of commerce, are public highways. While any obstructions placed in the same which will prevent such use are a public nuisance, they may be abated upon the action of a private individual who suffers some special damage not common to the entire community.—SPOKANE MILL CO. v. POST, U. S. C. C. (Idaho), 50 Fed. Rep. 429.

124. WILL—Construction.—A will gave to testator's grandson $10,000, the income to be paid to him "from the time he be fifteen years old till he be twenty-one years," when he was to be paid one-half of the bequest, and the other half at the age of 25 years. If the grandson should die before arriving at the ages mentioned, then the unpaid amounts, "together with the income thereon," were to be distributed among others mentioned in the will: Held, that the bequest was not present and absolute, but was contingent on his reaching the ages mentioned, and, he having died before reaching the age of 15 years, the bequest was properly distributed among the others.—IN RE ROGERS' ESTATE, Cal., 29 Pac. Rep. 962.

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